MINUTES

MONTANA SENATE
55th LEGISLATURE - REGULAR SESSION

COMMITTEE ON LABOR & EMPLOYMENT RELATIONS

Call to Order: By **CHAIRMAN THOMAS F. KEATING**, on February 18, 1997, at 3:17 p.m., in Room 325.

ROLL CALL

Members Present:
Sen. Thomas F. Keating, Chairman (R)
Sen. James H. "Jim" Burnett, Vice Chairman (R)
Sen. Sue Bartlett (D)
Sen. Steve Benedict (R)
Sen. C.A. Casey Emerson (R)
Sen. Debbie Bowman Shea (D)
Sen. Fred Thomas (R)
Sen. Bill Wilson (D)

Members Excused: Sen. Dale Mahlum (R)

Members Absent: None.

Staff Present: Eddye McClure, Legislative Services Division
Gilda Clancy, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing(s) & Date(s) Posted: SB 325, SB 290, SB 349, SB 350, SB 353; 2/14/97
Executive Action: None.

HEARING ON SB 353

Sponsor: **SENATOR DEL GAGE, SD 43, Cut Bank**

Proponents: **None.**

Opponents: **None.**

Opening Statement by Sponsor:

SEN. DEL GAGE, SD 43, Cut Bank, is asking the Committee to just table this bill. He would like to make some comments so it is on the record for future sessions and future generations to take a look at.

This bill is an afterthought of **SEN. THOMAS'** request and along with the fact that many have felt for a long time that the State of Montana has exceeded with its promotion of the Workers' Compensation program, what was initially intended that the program does in the State of Montana.

The bill exempts state agencies from the requirement to be covered by the state plan and allows them to adopt any of the other three plans. **SEN. GAGE** talked to the governor and asked him if this bill is dead on arrival. The Governor said not necessarily. **SEN. GAGE** told him to think about if we can allow the state agencies to investigate the possibility of the other two plans and they can save a million dollars in premium by going with a stock company, that is a pot of money that we wouldn't be spending. In addition to that, those stock companies will be paying the 2 3/4% tax on insurance written. That is another part of that pot of money. In addition to that, those stock companies are hoping they will make a profit on this business and they will be paying income tax on that profit. That is another part of that pot of money.

If we can build a big enough pot of money that the state plan, even losing this amount of revenue and these captures customers, if the state plan feels like they can't survive with the loss of those kinds of revenues and that kind of business, we can take a part of that pot of money and subsidize the state plan so they keep their rates down to those who are in an insurer-of-last-resort situation, which **SEN. GAGE** states in his opinion, is what the Workers' Compensation plan was for and we can then give the state plan that part of the pot of money so that you can keep the rates down for the people in the risk of private enterprise.

SEN. GAGE said the Governor responded that no one had ever talked to him about this in that light and that he would not necessarily just 'veto' the bill under that scenario. At that point the bill wasn't even drafted but since the Governor responded that way, the bill was drafted.

SEN. GAGE said he has spoken to people in state agencies and state government who feel like their rates are excessive in comparison to what they could get this business written for by other means in the State of Montana. It is his opinion that perhaps inasmuch as the State has a captive audience as far as the University System and the State of Montana is concerned, and we know in the past the State has not raised rates as much as they should have to keep fiscally sound, consequently we ended up with the huge deficit that we had, and it is not without the realm of possibility that currently the other rates which are being charged outside of the State and University System, may be subsidized by the premiums being charged to the state agencies. That is good for the other insureds out there that are with the state agency but it is a bit of imposition on private enterprise when they don't have that type of a captured audience in a captured line of business. That was the main reason this bill

was brought before the Committee, to give us a chance to allow those state agencies to do some shopping around, find out if they could save the taxpayers in the State of Montana some money, not necessarily harm the state plan by doing it if we could keep the state plan going as an insurer of last resort, and still have a pot of money to do other things with.

When **SEN. THOMAS'** bill went down it was clear that this bill was probably going down worse than his did because it has a larger impact on the State Fund. With that he recommends this bill be tabled.

NOTE: THERE WERE NO PROPONENTS NOR OPPONENTS AND NO CLOSING STATEMENT BY THE SPONSOR OF SB 353.

HEARING ON SB 325

Sponsor: **SENATOR BILL CRISMORE, SE 41, Libby**

Proponents: **Jill Andrews, Montana Mining Association**
Elton Chorney, Continental Lime, Inc.
Ronald Dovall, Golden Sunlight Mine
Joe Scheller, Ashgrove Cement
John Petit, Luzenac America
Bill Snoody, McDonald Gold Mine
Richard Dale, Golden Sunlight Mine
Russ Ritter, Montana Resources
Jacqueline Lenmark, American Insurance Association
George Wood, Montana Self-Insurers' Association

Opponents: **None.**

Opening Statement by Sponsor:

SEN. BILL CRISMORE, SD 41, Libby, this bill changes the inspections in the metallic and non-metallic mines. Right now the Federal Agency of Mines **(MSHA)** does four inspections per year and the state is doing one inspection per year. This bill would eliminate the state inspections which are only a duplication. It would also move the mining association and the mining people themselves into doing their own safety training. Several people present are ready to testify what their plan is.

Proponents' Testimony:

Jill Andrews, Montana Mining Association, handed out information. **(EXHIBIT 1)** There is an executive summary immediately following the bill copy on a dark yellow sheet, there is a list of MSHA fatalities behind the blue sheet, there is a result of a survey taken from companies who have self-insurance programs, one was done in 1995. There is an outline of the Mining Association's proposed training program which follows the light yellow sheet at the back.

They support this bill because it eliminates an unneeded state government activity. Metal mines are highly regulated by federal law to insure that employees are trained and mines are operated safely. Metal mines are inspected twice a year by the Federal Mine Safety and Health Act requirements. Employees may anonymously report any unsafe working conditions to MSHA. Companies are required to have ongoing safety training programs and all of the large mines also have safety directors on staff. The state has authorized the Department of Labor and Industry to regulate mining and conduct their own inspection programs. These programs duplicate what is already being done by the federal government.

Many of the state regulations are outdated and conflict with federal regulation. **Ms. Andrews** states that mining is a hazardous occupation. It is particularly hazardous to an untrained worker. MSHA requires that each new underground miner take 48 hours of training before starting to work. Every surface miner takes 24 hours of training.

They are very supportive of training requirements that would make sure that needless fatalities are prevented. There have been very few fatalities in mining in the last five years in this state. The one MSHA fatality last year was in the sand and gravel operation.

The Montana Mining Association strongly believes in safety training and is undertaking an effort to not only train their members, but any miner in the state who would like to participate. They offer these programs at no charge to participants. An outline of their curriculum is enclosed in **(EXHIBIT 1)**. The chairman of the safety committee, **Elton Chorney, Plant Manager of Continental Lime,** is also available to answer questions on safety program. Their goal is to provide the best training for miners in this state. The timber industry, heavy engineering contractors, and the trucking industry have increased their safety and training and organized self-insurance programs with outstanding results. They respectfully request a do-pass recommendation on this bill.

Ronald Dovall, Golden Sunlight Mine, Whitehall, Montana, said he has been a safety director for over 18 years. Over a period exceeding eight years, the safety directors within the Montana Mining Association companies have voiced concerns to the Department of Labor over lack of support in some areas they felt really needed some attention to benefit mining in general.

To improve safety performance and accidents, employee training is the most important aspect of any safety program. They have been contacted by many small miners and contractors each year trying to acquire adequate safety training for their employees. They find it difficult to get the state to commit to do this training. In many cases they have faced MSHA fines for not having their employees trained. They have had reports of substandard training

to the point those same miners and contractors have contacted them and asked for their assistance in safety training.

The Montana Mining Association Safety Committee has reviewed the training records of the Department of Labor and find the majority of the training is being conducted for public employees. Of this training, first aid training exceeds safety training. This method of training is a reversal of proven safety methods. This is not preventative training. Many of the small miners and contractors indicate that the state trainer has placed more emphasis on first aid and safety.

They believe that the state trainer may not be complying with all MSHA mandated training as set forth in 30CFR part 48. They have had reports that mandatory subjects are not being presented. **(EXHIBIT 2)** substantiates that. The Mine Safety and Health Administration has also voiced their concerns in passing.

They believe the training division at the Department of Labor is doing a disservice to the citizens of Montana. They have taken their concerns to the Department on many occasions and have offered assistance with training and developing a system which will be beneficial to all who pay for the service. As past chairman of the Montana Mining Association Safety Committee, he has met with the Department in the attempt to resolve this issue. He has been assured repeatedly that their concerns have been addressed. To date they have not seen that. The mining community and contractors who work on mining properties are faced with a real dilemma. Their employees must be trained in accordance with MSHA standards. The state who is receiving the money from MSHA to conduct this training and is charged with the training is not doing the job.

They believe the state should get out of the training business and leave it to the private sector. The state presently is in direct competition with many small private companies conducting training for fees. The training provided by these companies far surpasses the present training provided by the state. These companies have an incentive to perform at a higher standard, the incentive being repeat customers. He stated that **Ms. Andrews** mentioned a poll taken in 1994 and another poll last week. **(EXHIBIT 2)**

Another area he addressed is inspections. This is an area where much discussion is taking place. They believe the state-mandated inspection program is antiquated and duplicated. The Mine Safety and Health Administration currently conducts comprehensive safety inspections at least twice a year at all surface mines and four times a year at all underground mines. Mining companies recognize MSHA as the foremost inspection authority.
MSHA also provides support in all areas of safety, health and technical assistance. The state presently provides none of this assistance. The safety standards used by the state are antiquated and have not been updated since 1972. Mining

technology is advanced to the point that many of the standards are obsolete. This is especially true in the areas of explosive safety.

The private sector and the Montana Mining Association has many experienced and professional persons to draw this expertise from. The other part of this duplication is that a mine inspector sometimes on mining property during an MSHA inspection or follows an MSHA inspection which creates the situation for animosity. This duplication for inspections is unnecessary and costly for mine operators.

They are presenting this bill in the effort to insure all workers within the mining industry have an equal opportunity to receive quality safety training and thus reducing injuries and Workers' Compensation costs to all employers in the state.

Joe Scheller, Safety Director, Ashgrove Cement, Montana City said that Ashgrove Cement Company operates a mine in a cement manufacturing facility in Jefferson County. They are proud to say their employees have operated last year over 209,000 man hours accident free and their large equipment and haul truck drivers have driven over a million miles accident free. Safety in Montana mines is serious business and it is a serious business at Ashgrove.

He supports this legislation for three reasons, the first of which in their opinion, they also feel the state safety bureau is duplicating a very well-run, very efficient federal program, namely the Mine, Safety and Health Administration. He compared the federal and state mine safety regulations. **Mr. Dovall** from Golden Sunlight has indicated that is the current edition of the State Mine, Safety and Health regulations. It was last updated in 1972 and he had a small miner friend go to the address listed in the front of the book to try to get some technical assistance. Instead of the Mine Safety Bureau he found the Alternative Education Center.

By contrast, the current federal mine safety regulations are Federal Regulations 30CFR, parts 1 through 700. They are more extensive and accumulative. In addition, the Federal Mine Safety Regulation, MSHA, updates their standards on a regular basis. The Mine, Safety & Health Administration lists a fairly extensive grouping of miner's rights, the most important of which is a miner's right to a safe work place. Additionally, federal law dictates that any miner who has a dangerous situation can contact their local Mine, Safety & Health representative and have an immediate safety review of that situation. When those reviews take place, in their experience the MSHA inspectors are quite prompt in arriving at the property and usually doing so within the hour.

Another reason **Mr. Scheller** said he supports this legislation is that individual mining companies have an economic incentive to

work safely. The National Safety Council in their latest statistics estimate that each loss time accident costs an employer $15,000, not only in lost work time and productivity, medical claims and costs, litigation, etc. At Ashgrove, like other large mining companies is self-insured so there is a huge incentive to work safely.

Also, their facilities are inspected on a routine basis, normally four to six times per year by their associated insurance companies and risk professionals who have a financial interest in their operation. Everything from fire, elevator, and boiler, they have an insurance professional who inspects to make sure their insurance investment is adequately protected.

The last reason **Mr. Scheller** urges the Committee to support this bill is that in their view, the money is spent on mine safety inspections could certainly be better spent in other industries. The 1996 statistics from the National Safety Counsel refer to lost work days on the job per 100 employees and of all the major industries listed, manufacturing is the highest with five lost work days per 100 employees.

Transportation and public utilities are 2.36, wholesale and retail trade is 6, and at the bottom of the list is mining with an incident rate of 1.5 lost work days per 100 employees. Government employees rank at 4.13 lost work days per 100 employees, significantly above the mining community. He closed with a quote from the National Safety Council that in 1996 mining accounted for less than 1% of all cases involving days away from work.

John Petit, Safety Director, Luzenac America, which operates five mining properties in the State of Montana which include one underground mine, two surface mines and two surface mills. They employee 200 Montanans. In 1992 their mines were recognized by the Governor's Safety Award for innovation and safety management. They are a very pro-active company which insists on employee involvement.

Their mining properties have also experienced a great deal of frustration with the duplication of state and federal mine inspections. The Mine, Safety & Health Administration inspects their surface properties twice a year and underground properties four times a year. On several occasions the federal and state mine inspectors have been on site at the same time, yet refused to complete their inspections in unison. Instead, the state mine inspector returned several days later and duplicated the inspection task.
Their underground mine employees eight people, pulling an underground mine supervisor away from his daily task to escort the State Mine Inspector for a day was viewed a complete waste of time by their employees. Ironically, no violations were found during the inspection.

Mr. Petit stated that in all honesty, he cannot say that he has read completely through the state inspector regulations. What few standards there are are nearly a word-for-word duplication of past MSHA standards. The state standards are outdated and as mentioned earlier have not been revised since 1972. The MSHA standards are much more comprehensive, they are frequently updated, and miners have the opportunity to comment on new or revised standards prior to their initiation. MSHA has a better series of regulations.

In his opinion, the greatest need in the mining industry relative to employee safety is the need for quality comprehensive safety training. The inspections which are provided focus on unsafe conditions. It is well-known in the safety field that 90% of all accidents are caused by the actions of people. Safety training is currently one of the best ways to address and ingrain safe behavior in employees. Although the state mine inspector does periodically provide mine safety training, according to their employees and some contractors which have attended the sessions, the quality of training given was not relative, was substandard, or was unavailable.

In summary, the mining community and taxpayers would be much better served by eliminating the state mine inspector position, thus eliminating unneeded duplication of safety standards and inspections and transferring the mine safety training role to a more competent organization who is more aware of the needs and has greater flexibility to meet the needs of the employees and contractors employed in the mining industry in Montana.

Bill Snoody, McDonald Gold Mine, Lincoln, stated at this time they are not yet in operation but expect to see that change in the near future. As part of that expectation, they are beginning to build that safety program at this time. Having the training available, it will be made possible under SB 325 to help them achieve the high standard of safety which has been obtained by other mines in the state. He urges a do-pass on this bill.

Richard Dale, Golden Sunlight Mine, Whitehall, spoke in general terms of this bill. It seems to him the appeal of this proposal is very high because the objectives are straight-forward and consistent with the apparent desires of the citizens of Montana and the stated goals of this legislature and this administration. Those goals are to eliminate duplication and unnecessary work, reduce the size and expense of state government, provide the highest quality of services to the individual and business citizens of Montana, and more importantly, to set a pattern for success in the area of safety training and safety performance. This pattern for success already exists in Montana's timber industry, the Montana Contractor's Association and the trucking industry. More importantly, they have established a factual evidence of that success in a reduced number of injuries and fatalities.

In this industry, they have the resources, the desire, and the existing reality of a pro-active safety culture supported at all levels of their respective companies. The business and individual safety philosophy is the best assurance possible for the continuing improvement in safety training and safety performance for their employees, their families, and the independent businesses and individuals who need this training.

Therefore, they are confident that the passage of this bill will save money, reduce the state's burden of work, improve the quality of training and most importantly, reduce the number of injuries and fatalities among all those Montana people who work in or with the mining or industrial minerals business.

Russ Ritter, Montana Resources, Butte, said the Mr. Ray Tillman, the Vice President for Human Resources was planning to be present to speak in favor of this bill, but he had to return to Butte and asked **Mr. Ritter** to stand in his place and support this piece of legislation for many of the reasons previously stated.

Jacqueline Lenmark, American Insurance Association, (AIA), stated it is a belief of their association that effective safety programs occur when there is an ownership of those programs between industry and their insurers. They believe this bill encourages that result and they ask for a do-pass.

George Wood, Executive Secretary, Montana Self-Insurers' Association, reported their support of SB 325. They believe that it provides the adequate amount of inspections, a great educational program and no duplication. They ask the Committee reports a do-pass.

Opponents' Testimony: **None.**

Questions From Committee Members and Responses: **None.**

Closing by Sponsor:

SEN. CRISMORE said he is excited about this bill because he watched the logging industry go from the very worse they could be with accidents and no training. The state was checking their logging jobs. The logging industry started the Montana Logging Association and began their own training program. They have cleaned up their act, now their crews will be so proud of what they are doing on their own just like the people who have spoke in support of this bill.

They will do a much better job and it is a result of the safety and it is the way to downsize government a little bit. We may think we should not have the federal government involved but instead the state, but in this bill in the event MSHA does not improve their program or something happens to their funding, this bill says the state will take over the safety inspections.

(NOTE: SEN. KEATING SPONSORED THE NEXT TWO BILLS, VICE CHAIRMAN, JIM BURNETT TOOK THE CHAIR.)

{Tape: 1; Side: B; Approx. Time Count: 3:53 p.m.}

HEARING ON SB 325

Sponsor: **SENATOR THOMAS F. KEATING, SD 5, Billings**

Proponents: **Jacqueline Lenmark, American Insurance Association, (AIA)**
Bob Worthington, Montana Municipal Insurance Authority
George Wood, Montana Self-Insurers' Association
Mark Barry, State Fund
Jerry Driscoll, Montana Trades Council
Jim Hill, Employment Relations Division
Jack Holstrom, Montana Association of Counties

Opponents: **None.**

Informational Testimony: **Don Judge, AFL/CIO**

Opening Statement by Sponsor:

SEN. TOM KEATING, SD 5, Billings, said SB 349 makes some changes in the Department of Labor with regards to the regulatory functions of the Employment Relations Division. There was an advisory task force in 1949 which made a number of recommendations for all three Workers' Compensation Plans I, II, and III dealing with the regulatory functions and the assessments that funds the Department.

In SB 349 the Department has been involved in litigation over the assessment and as a result of the study, insurers have made a number of suggestions regarding the issues in the Department. Some of the recommendations require no legislation but there are some recommendations from that task force which do require legislation and they are embodied in SB 349.

First of all, they will deal with efficient regulation of the benefit system. The group has discovered some obsolete statutes and functions and have recommended repeal. Within the bill there will be the establishment of access to the Workers' Compensation data base which is in the Department by the insurers in the private sector.

Secondly, the Department will no longer have to make a determination on the wages not paid in money. That along with other disputed functions will be handled by the insurer. The independent contractor exemption should be a self-funding program which will be addressed in this legislation. The number of trade groups have joined together for group Workers' Compensation and the group was required to be certified by the Department but

under this bill, the insurer that is taking the risk of the trade group will determine whether the group was appropriately formed.

There will be an increase in penalties and damages for the uninsured employer. Those who decide to go bare will have to suffer the penalties. The underinsured employers statutes are being repealed and the utilization and treatment standards and medical advisory committees statutes are to be repealed in this legislation. We are reducing the amount of unnecessary work in the Department and putting responsibility where it belongs and hopefully streamlining the system and still protecting the employer and employee under the Workers' Compensation System.

Proponents' Testimony:

Jacqueline Lenmark, American Insurance Association, (AIA), which is a trade association comprising of around 250 property and casualty insurers. This bill is the product of several years collaborative study and work. It comes as a consensus bill and **Ms. Lenmark** briefly spoke of the history which has gone into this particular piece of legislation.

In June of 1994, the Department of Labor, in response to concerns which had been expressed over the administrative assessment that funds the Department's regulatory functions pull together a task force of all insurers who pay that assessment and Department staff to look at functions and the assessment, to do a wholesale review of that process.

As a result of that process, there were recommendations made to the Department. She submitted a copy of the report that was finalized as a result of that study to the Committee. **(EXHIBIT 3)** As a result of that process they bring two companion bills, so much of the testimony presented on this bill also applies to the bill that follows.

This is a lengthy itemization of various functions and **Ms. Lenmark** wanted the Committee to be reassured that each will not testify on the final bill and they have divided the bill up so they are not redundant in their speech. Each of the functions which is represented in this legislation has some dollar price tag attached to it. Some cost savings that will accrue to the benefit of the state and to the insurers that are funding this Department.

The sections of the bill that apply to the assigned risk statutes are repealed in this bill and also repeals the statutes that provided premium tax against the State Fund. The effective date of those statutes terminated in 1990 and those amendments simply remove those obsolete provisions from the code. In fact, one of those sections was addressed in the Code Commissioner's Bill this session, although not as effectively as here.

The Workers' Compensation Act provides that groups of employers who wish to ban together to form a trade group can collectively purchase Workers' Compensation Insurance. That is in Section 6 of the bill. When enacted, that statute required the Department to certify what sort of group of employers might join together. Insurers felt they could better determine the appropriateness of the risk they would insure and felt that should be a matter between the employers, the insured and the insurer.

In this legislation they have eliminated the Department review of those groups. In the repealer there is a section which repeals one portion of the Workers' Compensation Act. This makes no change to the law, it simply eliminates one section of code that was reproduced elsewhere in the act.

Finally, the Montana Workers' Compensation Act currently requires Workers' Compensation Insurers to make a type of security deposit with the Department of Labor. That particular section of code was enacted before there was an Insurance Commissioner and before there was a Property and Casualty Guarantee Fund.

The purpose of the security deposit was to ensure there would be sufficient funds on hand to pay benefits to injured workers if a company were to be insolvent. Under current law those deposits are simply turned over to the Property and Casualty Guarantee Fund if there is an insolvent company. It is a redundant deposit and the Guarantee Fund fully secures and guarantees all benefits to injured workers of an insolvent company and they felt it more efficient to have the insurance commissioner regulate those security deposits and those companies through the insurance codes.

Bob Worthington, Programs Administrator, Montana Municipal Insurance Authority, (MMIA), which is a Plan I self-insurer organization that insures cities and towns across the State of Montana. He was a member of the committee that **Jacqueline Lenmark** spoke of in her testimony. They worked approximately two and one-half years and this process is the culmination of that. Sections 7 and 8 beginning on page 10 deal with the Uninsured Employer's Fund.

He said it is the belief of that committee that the Uninsured Employer's Fund certainly should be a stand-alone operation and Section 7 of the bill amends 39-71-503 and states that all expenses needed to administer the Uninsured Employer's Fund including administrative costs and claim adjustment cost be borne by that operation. The Department has done that to this date. In the last year, however, that was not true in prior cases and they would like to make sure that is part of statute. Section 8 also addresses Uninsured Employer's Fund in that a penalty is assessed for uninsured employers. The penalty has been changed from double the amount the employer would have paid in premium on payroll to treble, or for those who have violated the uninsured

employer's obligation a penalty of $10,000 is assessed, whichever is greater.

Mr. Worthington said opponents will probably speak relative to the $10,000. There is nothing sacred about that number, although he requested the committee's consideration of a substantial amount. They feel strongly the penalty needs to large enough to deter any individual who is attempted to run his business as an uninsured employer. The minimal dollar amount now is of some benefit to people to stay as an uninsured employer until they are caught, pay the penalty and then move forward. Section 9, at the top of page 11, line 3 relieves the Department of the need to establish utilization and treatment standards.

His committee has spent a substantial amount of time looking at this issue. They feel that the development of utilization and treatment standards establishes some unnecessary thresholds for treatments and because there is such a variance in the types and degrees of injuries, they have some substantial concern about the time necessary to develop treatment standards which may not be needed in the medical community. Section 10 beginning on page 13, line 14 amends the statutes which deal with compromise settlements and lump sum payments.

Under this statute the Department must approve all compromise settlements or lump sum distributions. They strongly believe where there is an agreement by the claimant and the insurer that process go forward and not necessarily approved by the Department, therefore, the language contained in Section 11 changes that participation by the Department to the point where they would have 14 days to act on or disapprove compromise settlements or lump sum payments. If the Department does not act in 14 days, those agreements would be deemed to be approved.

They are trying to address the efficiency in that process and there are others who will address the language in the bill. Representing the cities and towns across the state, they request a do-pass on SB 349.

George Wood, Executive Secretary, Montana Self-Insurers' Association, supported this legislation. There is another bill in the committee which eliminates the requirement that the Department determine the value of property, other than money, as wages and provide that the wages will be determined to be the going amount of the area in which the work is performed. It will not need Department action to determine what the wages were. For example, if a house was given on a farm or a side of beef once a year to a hired man.

The other section **Mr. Wood** discussed is the fee for the exemption under the act. The present Workers' Compensation Act states that if you claim to be an independent contractor, you must have Workers' Compensation coverage or an exemption under the act. The fee in the statute is $25 and they propose that be changed

and allow the fee to be determined by the Department in an amount sufficient to process the applications. Putting a dollar amount in there does not take care of the changes in the expenses incurred by the Department in taking care of the applications. The law states that the exemption is good for one year and would be filed annually. They propose the Department set the fee for that application. They ask for a do-pass on this bill.

Mark Barry, State Fund, said they insure approximately $25,000 employers in the state. Over 50% of their employers pay less than $1,000 in premium per year. The Department of Labor and Industry assessment is a cost of the State Fund and they were involved in the process to look at the cost they have been assessed.

They do support the regulatory function and do support a form of regulation of the system. However, they are supportive of an efficient regulation. Section 3 of SB 349 addresses the Workers' Compensation data base system which was established during the 1993 legislative session.

The changes in this bill will assist insurers in cost containment efforts. The insurers will be allowed to obtain information on prior claims filed by injured workers that are reported to insurers. This allows the insurers to determine compensability of the claim or whether it is an aggravation of a previously reported claim to the same part of body. The access will also allow insurers to investigate potential fraudulent claims.

The bill allows insurers from other states will be able to get information on potentially fraudulent claims filed in Montana. This will act as a preventive measure against those few people who move from state to state filing fraudulent claims. In addition, part 6 of Section 3 of the bill makes the party or the insurer who receives any information from the data base liable for damages if the information is misused for any reason at all.

The Department has concerns about what type of information that insurers should have access to and they can surely understand that concern and will work with the Department on what information should be made available to insurers.

Also, current law requires the Department to publish a report from the information pile from the data base each year. This bill changes that requirement to a bi-annual report. They feel this will allow the Department to prepare a more comprehensive report of what is happening with the Workers' Compensation system in Montana. This report can be published prior to the legislative session and provide it to the Governor. Section 6 of the bill eliminates the Department's role in approving groups from joining together to obtain group Workers' Compensation insurance.

The State Fund has established several group programs which have been very successful and the Department is currently working with other groups to establish additional insurance programs. They feel this bill will allow them to move forward in establishing those relationships.

Finally, they would like to mention this bill eliminates the Underinsured Employer's Fund. This provision was presented in the form of SB 41 sponsored by **SEN. STEVE BENEDICT.** It is also addressed in this bill. **(EXHIBIT 4)** is the Department of Labor's functions of which insurers are assessed for fiscal year 1996 and their budget for fiscal year 1997. They support SB 349.

Jerry Driscoll, Montana Building Trades Council, said Section 11, page 14 of this bill allows the Department of Labor 14 days to approve a lump sum settlement which is in writing between the insurer and the injured worker. Presently, there is no time limit so injured workers may have to wait weeks to get the approval from the Department on something they've already agreed to with the insurer. They hope this section is adopted so there will be time limits so that the injured worker and insurance company come to a settlement and do not have to wait weeks.

Jim Hill, Bureau Chief, Employment Relations Division, was present in place of **Chuck Hunter.** They are in support of this bill, although without the same enthusiasm as the previous speakers. They have several concerns and intend to draft several amendments to the bill for consideration.

Section 3, page 3, line 27 gives them concern with what information should be shared from the data base. They believe in several cases, the information in the data base should remain confidential in nature. They would like specific direction on what information should be provided.

Page 4, line 19 they believe regarding the report should be restored to its original language and the report should be produced annually. It wouldn't cost that much more to produce the report on an annual basis. **REP. CHASE HIBBARD** who originally sponsored the legislation requiring the report would like to go on record as supporting an annual report.

They think page 4, Section 4 is redundant. The change is already in SB 41 which has passed the Senate and is on its way to the House.

Section 5, page 7, line 11 they are in agreement with. Additionally, there are three or four bills which deal with the independent contractor program. They feel it is important that all of these bills be coordinated so that we end up with one final product.

They concur with the change in Section 6, page 8 and 9.

In Section 8, page 10, line 20, the $10,000 figure referred to is much too high. The Department deals with many employers who have minor penalties and they feel this would be a major problem or burden to the small employers in the State of Montana who maybe have made a small mistake and should pay a penalty. They feel this is cost prohibitive and could result in a substantial hardship to the small employers in the State of Montana. Also, the language which indicates we should go back three years on the employer payroll is stricken from the bill. They would like to see that language restored. They need some kind of a basis to work with, and without clear direction they would have trouble determining how far back into the payroll records to go.

On page 10, line 27 in the same section they would like to retain the ability to put the $1,000 assessment in the Uninsured Employer's Fund. They have the ability to assess insurers for funds for the Subsequent Injury Fund. They use this money to pay benefits and therefore, believe this money should go into the Uninsured Employer's Fund.

Section 9, page 12 deletes the utilization and treatment standards and they concur with this change.

Section 11, page 14 changes they way they may approve settlements and lump sum payments. The second sentence on line 16 currently reads that if the Department fails to approve the agreement in writing, within 14 days the agreement is approved. They think the language should be changed to read that if the Department fails to disapprove the agreement in writing within 14 days, the agreement is approved. That is a minor language change. Also, this section does not give the Department much latitude for problems beyond their control. For example, if something is lost in the mail or if the Department does not receive enough information with which to make a decision, the agreement would be approved without their concurrence and they think the 14 day limit is pretty restrictive.

Section 11, page 14, line 22 through the end of the section is very difficult to read. It is confusing in terms of the purpose of this section. They propose the insurers put together a grey bill on that section so that the Committee has a chance to see how this section would read.

Section 14, page 16 on repealing the Uninsured Employer's Fund is redundant. That action was taken in SB 41 which is in the House.

Jack Holstrom, Montana Association of Counties, has also been heavily involved in the collaborative effort to create this particular piece of legislation. They urge a do-pass.

Opponents' Testimony: **None.**

Informational Testimony:

Don Judge, Montana State AFL/CIO, said they do not have great concerns about the content of this legislation but they do have concerns about page 3, Section 3, the new language on lines 27 and 28.

Mr. Judge has recently met with counterparts from other states and they have found that access to this data by insurers or employers can lead to concerns of black listing for employees who have had accidents on the job and whose injury accident claims may follow them from one job to another. That is particularly true and can be of concern in their building trades because this allows for insurers who insure also out-of-state to carry that same information out-of-state where there are no laws prohibiting the use of that data.

He said he understands there is new language on page 4 which states that if you find that users of that information obtained by the Workers' Compensation data base under this section are liable from damages arising from the misuse or unlawful dissemination of data base information. It is very difficult to prove that you didn't get a job because the insurer knows that you had an accident somewhere else or that you have a potential re-injury situation. He doesn't see the protections they hoped would be in this legislation to prevent the possibility of black listing. They would prefer that information in terms of and addresses of injured workers not be provided to the insurers. If they want to use it for rate-basing purposes or something else, what they get is the kinds of injuries and the kinds of occupations but not specific information regarding individuals who are injured on the job.

Questions From Committee Members and Responses:

SEN. STEVE BENEDICT asked **George Wood** to turn to page 10, beginning with line 17 what his rationale is regarding going from double to treble and from $200 to $10,000.

Mr. Wood said he thinks it is a figure to get someone's attention, he said he believes the triple costs are fine. This is to discourage people from avoiding the Workers' Compensation Act. The $10,000 becomes academic, and the $200 is because you usually cannot collect the penalty.

SEN. BENEDICT said they way he reads this bill is that this is basically an attempt by the insurers to get themselves out from having to fund the Uninsured Employer's Fund by making it so difficult to be uninsured that there isn't a need for assessments.

{Tape: 2; Side: A; Approx. Time Count: 4:28 p.m.}

SEN. BENEDICT said he understands what **Mr. Wood** is thinking in people who knowingly and willfully try to avoid Workers' Compensation premiums. He asked what he thought this bill would do in the situation that an out-of-state employer buys a Montana business and this is the only business of its kind that they are in.

They hire a manager to manage the business and this manager assumes the out-of-state company takes care of all the insurance, including Workers' Compensation. The out-of-state company thinks the manager is taking care of the Workers' Compensation. It does not get paid for a couple of years until it comes to someone's attention. Would this bill require the Department the option to take a look at the circumstances?

Mr. Wood responded that he thinks **SEN. BENEDICT** has called attention to a weakness in the bill and he doesn't know that the $10,000 is any magic number but he suspects that it would be better if the bill read "up to" and then a certain figure so that the Department has some discretion in that case.

Unfortunately, these problems usually do not show up until someone is hurt and then that particular employer has some real problems with being sued because he doesn't have coverage.

SEN. BENEDICT asked if the language "willfully or knowingly" would be appropriate?

Mr. Wood said the purpose of the act is to call to the legislator's attention to the fact that the situation does exist and this committee could well decide what type of wording to have to penalize these people.

SEN. DEBBIE SHEA asked **Jerry Driscoll** in Section 11, the Department of Labor suggested taking "the Department fails to disapprove the agreement in writing within 14 days", how would that affect this bill?

Mr. Driscoll said if it is on line 16 it says the same thing.

SEN. CASEY EMERSON asked **George Wood** on page 7 we have been discussing the $25 license fee and the last time it was discussed the time was set for a three year period, can that $25 for three years and then renew it every third year at $25.

Mr. Wood responded line 18, subsection (d) says that it remains in effect for one year. It could certainly be changed to remain in effect for three years.

SEN. SUE BARTLETT asked **Mark Barry** since the State Fund has several small accounts, people who pay less than $1,000 premium, what is the appropriateness of taking the penalty to a $10,000 level for uninsured, treble or $10,000? In other words what

should the premiums for a small employer be who has gone uninsured?

Mr. Barry responded Workers' Compensation is a mandatory coverage in Montana. There are those employers who are not paying for that coverage and are not caught until there is an injury. After that has occurred, then the costs tend to rise. In previous assessments insurers have been contributing to the Uninsured Employer's Fund. Those people who are trying to get out of this system until a claim appears should be penalized.

Mr. Barry said he does not have a strong feeling about the $10,000 and does not know what the average cost of a claim is for the State Fund. He thinks the point is there are employers that will not get coverage because there is only a $200 penalty. The minimum premium is $210, which is fairly low coverage for unlimited insurance. They should be able to afford that and negate the possibility of treble damages.

SEN. BARTLETT then asked **SEN. KEATING,** regarding the amendment of SB 45 to achieve going to a renewal of a three year period, should this bill pass how did he see the two bills being reconciled in the process.

SEN. KEATING responded there are several ways it could be handled, the provision could be deleted from this bill or they could coordinate it with SB 45 so that if they both pass they both state the same thing.

SEN. BARTLETT asked what his preference in this matter is since there is a conflict?

SEN. KEATING responded he doesn't have a preference right now as he hasn't had the time to consider it.

SEN. BENEDICT asked **George Wood** in regard to assessments again and the language that states the fee for the application and any renewal must be determined by the Department in an amount that is sufficient to fully fund the cost of administering the program what his rationale is behind that and coordinate it with his feeling about assessments.

Mr. Wood responded the problem with assessments that are not fully funded is that the costs shifts over to the assessment which is levied against Plan I, II, and III. Then there is those who is complying with the act and the intent of the act covering their employees by Workers' Compensation, paying part of the fee for those who want to take themselves out of the act. If people want to opt out of the act he thinks that is permissible. But those who are in the act should not pay for it.

SEN. BENEDICT asked why this wasn't attacked by doing something about the assessment and finding some other funding source rather

than an assessment on the insurers instead of letting the Department set their own fee?

Mr. Wood responded if there is a reasonable way to assess a fee sufficient to cover the cost so that it is transferred someplace else, he would support it. He felt that the fee determined by the Department would have to pass the budget office and budget process in the legislature and therefore it would be a reasonable charge.

There was talk about a dollar amount which doesn't seem to satisfy this committee. Regarding the $10,000, **Mr. Wood** said he omitted the fact that if you read that section it says the Department "may". Section 39-71-519 gives the Department the right to compromise that.

Closing by Sponsor:

SEN. KEATING closed by stating there are a number of good things in this bill that he hopes the committee will do-pass. If there are some areas that need a little work, he is sure the committee will handle it.

HEARING ON SB 290

Sponsor: **SENATOR THOMAS KEATING, SD 5, Billings**

Proponents:
George Wood, Montana Self-Insurers' Association
Pat Haffey, Department of Labor & Industry
Bob Worthington, Montana Municipal Insurance Authority (MMIA)
Allen Chronister, Montana Schools Group Risk Retention Program (MSGRRP)
Gary Weins, Montana Electric Cooperative's Association
Lance Melton, Montana School Board Association
Jim Brown, Department of Commerce
Don Waldron, Montana Rural Education Association
Mark Barry, State Fund
Jacqueline Lenmark, American Insurance Association (AIA)
Jack Holstrom, Montana Association of Counties

Opponents: **None.**

Opening Statement by Sponsor:

SEN. TOM KEATING, SD 5, Billings, said SB 290 revises the Workers' Compensation assessments. It is a simple bill and the assessment is based on the benefits paid rather than on premiums paid.

The Department and those who have requested the bill have worked out a percentage. Page 3, line 5 has a 2.15% and they are asking

to amend that figure to 2.6% of the benefits paid as the rate for assessment to the Department for their work overseeing this area.

Section 2 has an effective date of 7/1/99 so that the Department has time to adjust to this.

Section 1 will terminate 6/30/98 so they are coordinated. They will be asked to add an amendment to this bill and it has to do with establishing a regulation advisory council appointed by the Governor. Those amendments have been requested. This bill just changes the method of assessment for the Department and then establishes the council.

Proponents' Testimony:

George Wood, Executive Secretary, Montana Self-Insurers' Association, supported this bill as amended. One of the amendments is on page 3, line 5 where the 2.15% is stricken and 2.6% is added.

The other amendment will have to do with the effective date and the last pertains to the council setting the regulations. The principal effect of this bill is to simplify the assessment procedure that is used to raise the money that will fund the regulatory operations of the Department.

Presently, there is no reason for determining the equity between the three plans. This bill provides for a flat assessment of 2.6% on the benefits paid in the previous calendar year.

Benefits paid are defined as medical benefits, including hospitals and prescriptions and compensation paid. The limitation on medical benefits is to take care of catastrophic cases in the event that a case occurs which has a million dollars in medical payments. For the purpose of assessment only is limited to $200,000.

The present law requires cost accounting that assigns costs to one of the three plans and it is budgeted out in that manner. This does away with that, the Department gets the money and spends on the budget approved by the legislature and it does away with cost accounting which states you should come up with an equitable levy for direct and indirect costs.

Because of those costs there was a lawsuit against the Department in which judgement has been rendered that makes a change in what they must do.

At the present time we are sitting in a quandary with the Department levying under the old method but in a voluntary basis because they have no jurisdiction after the judgement to levy as they would normally. This corrects that problem.

Also, an employer can have a very large payroll and very small losses. When that happens a very disproportionate share is paid. It is actually an incentive for self-insurers to have as low accident rate as possible because this bill allows assessment based on losses.

Mr. Wood said this bill also simplifies and expedites the payment of the assessment. The Department now computes it, assesses it, and the payment comes towards the end or after the middle of the fiscal year. This would actually allow the Plan I, II, or III insurer to self-assess and pay it.

It calls for providing the pertinent data to the Department by March 31 and making one payment or half their total assessment on June 30, before the beginning of the next fiscal year or by December 31. This expedites the payment of the funds to the Department for their use in administration. He requests a do-pass on this bill.

Pat Haffey, Commissioner, Department of Labor & Industry supported SB 290. They support the methodology which is contained in the bill and also the 2.6% figure that they hope will be presented in amendment form.

They join all three insurance groups, the Governor's office, and others in supporting this. They fully support the amendment which calls for the Governor to appoint a Committee that will study the full function and scope of the Workers' Compensation regulatory system in the State of Montana. **(EXHIBIT 5)**

Bob Worthington, Programs Administrator, Montana Municipal Insurance Authority, (MMIA), supported SB 290. One of the most difficult processes the committee went through was trying to determine an appropriate cost allocation process with respect to the Department. They came up with a fee based on usage and then there was a great deal of negotiation among the committee relative to what that base should be. Getting to the base of paid losses was not an easy process but through compromise they were able to agree on the paid loss issue. It is a good compromise among all who are involved in paying for the assessment process and he requested passage of SB 290 as amended.

Allen Chronister, Montana Schools Group Risk Retention Program, (MSGRRP), said this program covers approximately 300 Montana school districts in all parts of the state and covers approximately 25,000 workers. This program has an extremely high payroll and under the current statute is assessed an extremely disproportionate share of the assessment, and has a very low loss which is paid.

Since June of 1992 **Mr. Chronister** has represented this program in the litigation of this assessment. They began by protesting the assessment which was imposed for two basic reasons. One was that

the Department's method of assessment did not comply with the statute.

Secondly, the Department had adopted an elaborate mechanism for enacting this assessment but had never complied with the Administrator Procedure Act to adopt it as a rule. They began in June of 1992 and in January of 1993 they finally got a hearing in front of the Department's hearing examiner. That hearing examiner rejected their challenge and they appealed to the Workers' Compensation court in September of 1993. In June of 1995 they received a decision from the Workers' Compensation court which upheld their position and held that the Department's assessment did not comply with the statute because the Department had not engaged in proper direct and indirect cost accounting as the current statute requires. The court ordered the Department to go back and adopt rules under the Administration Program Act which complied with the statute and to then recalculate the assessment since 1992 and give the school's group any refund for an assessment that was overcharged.

They are still waiting for that to be done. Since June of 1995, the Department has attempted twice to come up with rules which would satisfy the court's opinion. The first rules in June of 1996 went to a public hearing and as far as **Mr. Chronister** knows the Department abandoned that rule because they never heard about it again.

In December of last year, the Department again came up with some rules, distributed them informally, received comments and that is the last they heard of those. Neither set of the rules came anywhere close to complying with the court's order and it is **Mr. Chronister's** opinion based upon his involvement with this since June of 1996, almost five years now, that the Department is incapable of complying with the language in the current statute.

It is essential that the legislature change the statute and as **George Wood** has explained, this language in this bill is the most straight-forward, simple and equitable that anyone has been able to come up with. It will eliminate all the problems that they have been fighting with the Department about for the last almost five years. They support this bill.

Gary Weins, Assistant General Manager, Montana Electric Cooperatives' Association, supported SB 290. **(EXHIBIT 6)**

Lance Melton, Montana School Board Association, supported the bill as well as the amendments. He concurs with comments made by the previous proponents of this bill.

The fiscal note identifies the elimination of the money funded for the boiler inspection program and they think that is appropriate to the extent that they don't know if the administration fund should be funding it, but it should be

considered to fund it through some other means. The school districts have a lot of boilers.

James Brown, Chief of Building Codes Bureau, Department of Commerce, also supported SB 290 with amendments and stated they have a narrow interest in the bill. **(EXHIBIT 7)**

Don Waldron, Montana Rural Education Association, said the school districts he represents probably have the largest payroll for the towns where they are located. They use Workers' Compensation very little so they support this bill because they believe it will help them and their premiums. They support SB 290.

Mark Barry, State Fund, said they support SB 290 with the amendments.

They would like to see two other changes to the bill. In Section 1, part (c) the word "fees" have been changed to "taxes" and they would like to see that changed back. He said they do not want to start paying taxes.

Also, Section 2, part (c) they would like to see the same change.

Jacqueline Lenmark, American Insurance Association, (AIA), also supported this legislation. They will be requesting a friendly amendment to the bill to raise the assessment percentage to 2.6.

They are in agreement that the effective date that is currently shown on the bill needs to be corrected, not the intent of that particular section but the way it is drafted.

They are in support of the amendment which is requested by the Department of Commerce as well as the Department of Labor's requested amendment to create a council to further study the regulatory functions of the Department. They ask for a do-pass recommendation.

Jack Holstrom, Montana Association of Counties, supported this bill as amended.

Opponents' Testimony:

None.

Questions From Committee Members and Responses:

SEN. SUE BARTLETT asked **Jacqueline Lenmark** in regard to the effective dates in reading the technical notes on the fiscal notes where it comments as well the difficulty in understanding what is intended by the retroactive applicability because it speaks to taxes collected on or after, is not the whole point of the bill to do an assessment based on benefits paid? What is the retroactive applicability?

Ms. Lenmark responded the assessment will be based on the benefits paid in a calendar year. The benefits for the calendar year will be calculated and reported to the Department on March 31 following the end of the calendar year. The first payment based on that calendar year's benefits will be paid June 30. If the insurer elects two payments then half of the payment will be due June 30 and the second half the following December 31st. That effectively moves up the payment of this assessment to the Department.

Currently, they are being assessed in November for a period that reaches back to July 1 and then goes to the following July 1 for the fiscal year. The Department is waiting for its payment. The new method will time the payment with the beginning of the Department's fiscal year. When the amendment is drafted, there will be no language regarding retroactivity.

The transitioning from the current method to the new method is what has created the problem. **Eddye McClure** has been working with them to make sure that is correctly drafted. We should see language clarifying the tax years that each particular method relates to so that it is clear.

The other critical thing about the effective date is that they do not intend for this new method to go into place until July 1, 1999. That is to give the Department an opportunity to look at its budget and make adjustments if necessary and also to recognize that its current budget is being acted upon in this legislative session. It will be funded as it has been in the past by the old type of assessment against the insurers.

{Tape: 2; Side: B; Approx. Time Count: 5:08 p.m.}

Closing by Sponsor:

SEN. KEATING closed by stating the committee would make a lot of people happy if they passed SB 290.

(NOTE: THE COMMITTEE TOOK A 9 MINUTE BREAK BEFORE HEARING SB 350, SEN. KEATING RESUMED HIS POSITION AS CHAIRMAN)

HEARING ON SB 350

Sponsor: **SENATOR WALTER MCNUTT, SD 50, Sidney**

Proponents:
David Owen, Montana State Chamber of Commerce
Riley Johnson, National Federation Independent Business, (NFIB)
Jamie Neer, Jamie's Auto Body Shop
Kathleen Schulte, Northern Montana Association of Realtors
John Shontz, Montana Association of Realtors
Carol Phillips, Representing Self
Punky Darkenwald, Representing Self

Dean Randash, NAPA Auto Parts
Bob Gilbert, Montana Petroleum Marketers
Debbie Leadbetter, Representing Self
Diane Rice, Representing Self
Charles Brooks, Billings Chamber of Commerce
Ronda Carpenter, Montana Housing Providers
Karen Haar, Northern Montana Association of Realtors
Jack Martinez, Superior Fire Apparatus
Karen Roche, Northern Montana Association of Realtors

Opponents: **Pat Echart, Human Rights Commission**
Sue Fifield, Montana Fair Housing
Catherine Swift, Representing Self
Alane Harkin, Representing Self
Janice Doggett, Representing Self
Mike Melloy, Representing Self
Christine Kaufmann, Montana Human Rights
Kate Cholewa, Montana Women's Lobby
Sharon Hoff, Catholic Conference
Jim Meldrum, Representing Self
Al Smith, Montana Advocacy Program
Mary Westwood, Representing Self

Opening Statement by Sponsor:

SEN. WALTER MCNUTT, SD 50, Sidney, said the change in this bill from current is a result of many, many complaints about the structure and procedure which is being used by the Human Rights Commission. These complaints come from all over the state from housing business, legal, and other sectors of our economy. He stated what he wants everyone to understand is that this bill does not change the substance and commitment of human rights that this state is made of. Rather, it is looking at the procedures which are used by human rights.

SEN. MCNUTT referred to **EXHIBIT 8.** Exhibit 1 in the book began with a small newspaper ad from a Billings newspaper. The ad was placed by a 70-year-old lady. The Concerned Citizens' Coalition did a follow-up as a result of that ad. The ad had the word "adult" in it. She received a violation of which there is a copy on page 2.

After the Coalition visited the premise and did their "sting" operation, which **SEN. MCNUTT** stated he is reluctant to use that term but it is sort of what it was, they found that this lady wouldn't rent to them because of children so she had a violation.

SEN. MCNUTT said he is trying to present due process and what civil law means and the way the Human Rights Commission reacts to this. He said they had an informal hearing of which, on page 3, in the body of this letter it states, "The fact finding conference is not a hearing as provided in the law but rather an

informal, conversational conference. In view of the scope of the conference, it is an inappropriate forum for legal arguments. Any attorneys present may be used for consultation only. The information submitted at this conference will be considered as part of the Commission staff's investigation". **SEN. MCNUTT** said that statement was contrary to his way of thinking on the matter and he became interested in this.

The Coalition filed a complaint on page 5 of Exhibit 1 in **EXHIBIT 8.** He then referred to page 7, paragraph 11 and then page 10. On page 10 the respondent agrees to pay the claimant $500 in the form of a cashier's check and this should be made payable to the Concerned Citizen's Coalition. She must also agree to perform one hundred hours of community service at $8 per hour for the Concerned Citizen's Coalition. So we have a claimant that was rewarded with money and time.

SEN. MCNUTT stated that struck him a little bit odd as to the way things should be done. So he did more research and found out that this legislation is probably not a new issue, that the 46th Legislative Session approached this when Tom Judge was Governor. Some of the same language was in that bill that is in this present bill and our attempt is to reorganize the structure and the procedure.

SEN. MCNUTT said he had an attorney phone him from Missoula who was not able to attend so his testimony is submitted for the record. **(EXHIBIT 9)**

Proponents' Testimony:

David Owen, Montana Chamber of Commerce, said he often refers to the challenge of offering jobs and the challenge of being an employer today that has become increasingly difficult and he wants to focus on one of the strongest challenges that employers face. That is dealing with the Human Rights Commissions, more specifically the procedures used by that commission.

He clearly stated that is for good reason that the state has, as its policy, not wanting to allow discrimination. We have set up an agency to give people who feel as though they have been discriminated against, a place to take their grievance. We have watched the development of this agency over twenty years drift to a point where now the business community and his members believe it lacks balance. It is out of reach and beyond reason for the people who stand before it as the accused.

As **SEN. MCNUTT** mentioned, in **EXHIBIT 8** SB 110 is a 1979 bill at the request of Governor Tom Judge, indicating this was an issue then. Maybe one of the answers to this is placing this commission in the Department of Labor. This issue is not new and it is certainly time to take a step that is reasonable.

Mr. Owen stated he is not present to defend the violators of human rights but they are asking for a change in these proceedings. Most of the businesses don't have full-time human resource development people and can't afford them. They employ about ten people and it is all they can do to try to keep their business open and do this all correctly. They deserve better procedures and it is time for their grievances to be heard, they have been ignored too long.

Mr. Owen said he tours the state a lot and learns a great deal in the twenty cities. He hears a lot about the Human Rights Commission and he hears this in every town he visits. The people tell him they feel guilty until proven innocent. They feel like the staff is there advocating for the complainant. The only response the business gets is that they had better get an attorney.

They have investigations that are left hanging open and hearings that are cancelled because people have left the state. The investigations aren't cancelled, they are just left open until the people may return. Someone called him two days prior to this hearing saying they invested a lot of time with their attorney to get statements from their employees that they were asked to get by the Human Rights Commission staff and also some of their past employees. They supported the position of the employer and when they turned them in they received a letter or a phone call to let them know those statements were being discounted because they were all employees. The employees were the very people they were sent out to get statements from.

It seems to most of these businesses that the claimants do not have any standards of proof for their claims. There are high standards to prove that these people haven't discriminated.

The frustrations have gotten to the point where employers face situations where their employees quite often say go ahead and discipline me, I'll just turn you in. We have fallen into a cycle in twenty years that this bill is trying to end.

Employer groups who have fallen into this go to the Human Rights Commission and sit down with antidotes and hear the technical explanation of why they do what they do and the Human Rights act like they haven't heard some of this before and they have a lot of empathy. Then the employer appreciates their time and six months later there is still no answer.

Something needs to change and **Mr. Owen** believes this bill will bring that about. It would be wrong for him as a spokesperson for the business community to belittle or ignore the people who feel like their rights have been violated and to take some of what we will hear in this hearing and suggest it is not important.

Mr. Owen believes this bill is an answer to some of the problems and is asking the Committee for thoughtful consideration.

Riley Johnson, National Federation Independent Business, (NFIB), which is over 9,000 small businesses. Their average member is two to three employees and under $200,000 gross revenue from their business.

He said unquestionably, over the last fifteen years that he has worked with **NFIB**, the biggest complaint they have had from their members is dealing with the Human Rights Commission, not because they don't agree with Human Rights and agree with discrimination, but they encourage nondiscrimination and encourage Human Rights but something has happened.

Several of the businesses have characterized dealing with the Human Rights Commission as a David and Goliath story or experience. The Human Rights Commission is Goliath and small business owners are David. The problem his members are finding is that David has a problem. According to the Human Rights Commission rules, David is forbidden to bring his sling and his stones. It is pretty obvious what the outcome is going to be.

There is a fear among small business owners, which should not be there, regarding the Human Rights Commission and the way it operates. **NFIB** considers this bill an equal access to justice. They do not have staff attorneys or human rights staff personnel or staff accountants in their businesses. They also don't have the time to take hours and days away from their businesses without adding staff and costs.

In some cases, closing their business down when it is a one or two accounting business or law office or service business, virtually shutting their business down a couple days at a time to fight this. **NFIB** strongly urges a do-pass on this bill.

Jamie Neer, Jamie's Auto Body, Helena, said he really appreciates the committee taking the time to listen to the proponents. He just had his twentieth anniversary in business this past May. He owns a body shop in Helena.

His first experience with Human Rights started in 1992 and this is still going on today. The meaning of Human Rights should be for both parties, employees and employers but it seems to him and a lot of his fellow business people in the state, the employer is taking second fiddle to the employees. They all feel they do not have any rights anymore.

He said he has worked himself to death in his trade for 35 years, been blessed by God many, many times to have his own business for 20 years, and he is running scared anymore to know what he can and can't do.

Many of the employer's concern is that they are considered guilty before they even have had a chance to prove themselves innocent when they haven't done anything wrong. When you first get a letter in the mail which says you are being sued for something, for a person like **Mr. Neer** who has been in business as many years as he has, doesn't even know what he supposedly has done wrong. All of a sudden he received a lot of letters and decided to hire an attorney to find out what he did wrong, he didn't understand how the system is played, and then discovered what attorney bills are.

Employees, on the other hand, can go to Human Rights and get free counsel, ask any question they want and they will get an answer. When **Mr. Neer** was first exposed to this system he went to the Human Rights Commission to try to get help for himself. He was told they could not help him.

He felt as if he had no rights and they suggested he find legal counsel. **Mr. Neer** asked where all this money is suppose to come from? He has eleven employees and his average payroll is in excess of $250,000 per year. In his trade that he dearly loves, his profit margins are getting cut down year by year.

He could have made this case go away in 1992 if he would have given this individual $5,000. But one of his very close friends who has been in business longer than **Mr. Neer** has told him it is legal blackmail.

Mr. Neer said he is the type of person who can be pushed and pushed and as a lay person it has been gratifying to know that if you do things right, things can change. **REP. CHASE HIBBARD** has helped **Mr. Neer** with his first initial bill and **SEN. BARTLETT** was on a committee and it was really enlightening to **Mr. Neer** to know there are people who are concerned for the business people.

Governor Racicot told him that this state is made up of approximately 94% small businesses. **Mr. Neer** thinks it is time to start putting forth credit where it is due. If it wasn't for all these small businesses what would be left?

Mr. Neer said it is getting very frustrating to him to even keep his doors open. He gave an example of how the employees are getting educated. He has a procedure in his body shop and about a month ago one of his men was not following procedure. He wrote down what he wants done every day and he was not following procedure.

Mr. Neer said he went to this man and put his arm around him and told him that there is a problem here, he is not following procedure. The man looked at him and said, "So fire me, I'll sue you".

Mr. Neer said all he has done for this individual is provide him a job, provide him a very nice work place and provide him an

awful lot of money. All he expects in return is for him to do his job and he will get a check. Employees now days have completely changed.

Thirty five years ago, **Mr. Neer** said he was tickled to have a job. He loves doing what he is doing. He said he is at a point of pulling the plug on the whole thing. But he has worked too hard and too long to give up on this.

With help from **REP. HIBBARD** and other folks, things are working.

Mr. Neer went up to the state a week ago with one of his problem children, and he considers all these men his kids and feels that he is raising another family. He has been married 33 years. He said he asked if they had a cup of coffee and a place to smoke and they invited him right in. They answered his questions and all four of these people on this board said, "Jamie, fire him".

Mr. Neer said he had taken information on this individual. He asked if he should keep this man and keep getting harassed and called names? Should he let one individual disrupt his whole operation? What can he legally do?

All four of these people told him to fire this guy so **Mr. Neer** said he is on cloud nine and asks these people if they will sign a statement saying he could fire this individual. They all told him they would love to but can't, but if they were to get subpoenaed, maybe they could. **Mr. Neer** said he left feeling real good knowing that these people are listening and trying to do what they've told him they would do.

There have been a lot of statistics put out by the Human Rights Commission on these cases that are settled. They are not telling the whole story with these statistics. A very close friend of his had four cases going on at the same time. The man has done nothing wrong and it has cost this individual a pile of money.

Mr. Neer said he could have stopped the case against him in 1992 but feels there is a time a person needs to stand up for what he believes in. He hoped he has not said anything to offend anyone but the small business people are the backbone of this whole country.

Kathleen Schulte, Northern Montana Realtors' Association, Flathead County, said when a former governor appointed the first Human Rights Commission she cheered his actions and thought that Montana stood for equality which is great. Over the past two years she has been forced to question the conclusion she drew that day.

On May 2, 1995, a subpoena was served to her association to produce for examination books, papers and other evidence that might indicate discrimination against children. As an

association which had long been known for providing equal opportunity housing she was shocked.

Ms. Schulte said she could not imagine a realtor turning down an opportunity to provide housing for a family. She said she has to admit she also could not imagine a licensee turning down an opportunity to earn a commission.

Ms. Schulte said that she had been a foster mother to over forty abused and neglected teenagers. She has four children of her own and one grandchild. She would not work for a group that engaged in discrimination.

After the allegations were all leveled and 23 letters had been received by different Flathead Valley people, including the County Commissioners, threatening each with a $50,000 fine, they began to discover the procedures of our present Human Rights Commission which do not offer due process.

Ms. Schulte furnished the committee a copy of the first letter **(EXHIBIT 10)** which was received from the Human Rights Commission. They like to say it was their intent to threaten them or have them pay the $50,000 each. In the highlighted section you will see the first contract from the Human Rights Commission. They had already made a determination.

Ms. Schulte said their entire community was stressed out after the Human Rights Commission attorney publically called the citizens of the valley some of the worst discriminators in the country.

Briefly, three subdivisions whose restrictive covenants had been written by legal counsel and restricted by government planning bodies, were under the impression that they had established housing for older persons. They thought they had created their own Montana version of Sun City.

Families were not denied access to ownership of these homes, however, restrictive covenants were disclosed in order to comply with disclosure regulations passed by this legislature a few sessions ago. Wording should have been chosen more carefully to avoid the implication of discrimination against children. If the planners and legal counsel had been informed on how to set up legal housing for older persons, these subdivisions may have qualified under federal regulations as an exception to the regulation.

There has never brrn anyone claiming to have been discriminated against. The Montana Human Rights Commission searched over a year to try to find someone whose housing rights had been violated on this issue. There was no one.

From May 2, 1995 through today **Ms. Schulte** said she has come to know the Commission and their procedures. They spend over one

and one half years with their scare tactics and threats against innocent, kind people who only wanted how to do it right. Their legal counsel acted aggressively and with a mean spirit. They chose to level threats instead of conciliation for many months.

They were not able to act both as a complainant and as impartial administrator of the procedures. They were difficult to negotiate with, seeming focused on the money rather than fair procedures.

There was a letter with a $50,000 threat in it. After negotiations had begun and they had decided they needed to be more conciliatory, they got a second letter for only $37,500 each.

The Human Rights Commission was very uninformed on the specifics of the regulations at the time their charges were being leveled. They could not answer the simplest questions at public meetings. They closed the meeting to representatives from Flathead County which resulted in the county filing a lawsuit against them to open the meetings back up to the public.

Ms. Schulte said she has the greatest respect for the Federal Fair Housing Regulation and a great deal of respect for HUD who enforces the federal regulation and for their procedures. She does not have the same respect for the Human Rights Commission staff due to their failure to follow due process procedures. The Commissioners themselves have exercised too little control over the staff.

Ms. Schulte said she found it very peculiar in leveling their case against the citizens of her valley, the Human Rights Commission did not name the attorneys who wrote the covenants and did not name the planning body who created the restrictions. Indeed they were very discriminating.

Part of the settlement agreement that **Ms. Schulte's** association has with the Human Rights Commission allowed them to come to their association office and use their computer to do a word search for words that might indicate familial status discrimination. Their attorney composed the nine word list during the negotiations. The settlement agreement allowed them to visit anytime before January 1, 1997.

Three weeks before the end of their year the association heard from them. They wrote to say they would be in their office on December 18 to do compliance monitoring. **Ms. Schulte** said they were welcome but that was the day of the association's annual Christmas cookie party and they might want to consider a different day. **Ms. Schulte** agreed to let them come three days in January. They showed up four weeks ago.

Ms. Schulte set up one investigator with the computer and a data operator to assist her to do a word search for compliance. She

set up the other investigator in an adjoining room to look at the hard copy data. She returned telephone calls and went back to the computer to see how things were going. While she was out of the room, the investigator had given a different word list to the operator. She was searching for words not agreed upon in the settlement. She recognized the list as one that HUD had told them in January of the previous year not to use because it contained words which were not discriminating.

She discontinued the unapproved word search. When she cut off the computer, the word being searched was the word "quiet". The investigator acted in a manner that can only be described as hot-headed.

Ms. Schulte said she went into the other room where the other investigator asked her for hard copy books that the settlement agreement had closed to further investigation. She asked the investigators if they were there to monitor compliance with the settlement agreement. The lead investigator informed **Ms. Schulte** that she had never read the agreement. Since this was obviously not what was agreed to, she had to ask them to leave. She asked the investigator to leave a copy of the word list and she would not.

Ms. Schulte does not believe this is due process **(EXHIBIT 11)**, nor fair and impartial.

The Human Rights Commission administrator has, since that event, furnished statements to the press. **(EXHIBIT 12)** There was no team of investigators in Kalispell recently trying to catch realtors using the term "quiet" to describe a property or neighborhood. Rather, there were staff members present to oversee a settlement in a recent case.

She asked if it were possible that the administrator had not seen the word list that the staff member received from the staff attorney? Or is it likely that the administrator sent a staff person to monitor a settlement agreement that the staff member claimed to have never read? If that staff member was present to monitor compliance, how could she explain why she didn't even bring a copy of the settlement agreement with her. She had to borrow a fax machine to have the attorney fax her a copy of the page with the nine word list.

She has four sworn affidavits in her Kalispell office attesting to the events of the investigative January visit. The investigator's actions of January indicate they were untrained in words at the time, even though HUD's word list recommendation. They should use credible investigative techniques. They should be forced to follow due process rather than their present guilty until proven innocent tactics. The staff should not be allowed to issue their own subpoenas, but should get Commission approval first. They should not be allowed to be the complainant, investigator, hearings administrator, and keeper of the fines.

This is unprecedented in the legal realm. Due process is the right to have a matter decided by an impartial party with the opportunity to present your side of the story.

Ms. Schulte's association did not have either when the letter **(EXHIBIT 10)** came to them. The tone of that letter shows a definite lack of impartiality and shows an abusive power. The Montana Human Rights Commission is unable to act as the complainant while remaining an impartial body.

The following quote was made by their administrator in a public hearing at Kalispell while their 23 cases were being processed. She stated, "You remind me of the people who used to hang signs in their windows that said 'NO INDIANS, NO DOGS ALLOWED'". These words are insulting and inflammatory.

Page 2 of the settlement agreement **(EXHIBIT 13)** has a highlighted statement which states that the agreement does not constitute an admission or finding that the settling parties have violated the Montana Human Rights Act.

As of the date of this agreement, no complaint has been filed by or on behalf of any person claiming to be aggrieved by any discriminatory practice of the settling parties.

Ms. Schulte stated there are groups who interpret the actions they have taken to cut the Human Rights Commission budget and to testify on behalf of due process. The Commission acts as though they do not agree with Fair Housing Regulations. Realtors' associations have long been defenders of equal opportunity housing. They have been promoting it over thirty years longer than the law has existed.

They object to lack of due process; over interpretations of the law, a failure to education and conciliate, and a practice that seems to be based on money and confusion. Either of two actions by the Human Rights Commission could have prevented all the travail that still continues. If they were not allowed to act as its own complainant, they could not have created an action without an injured party. They would have been forced to talk to the citizens of the Flathead Valley to correct the improper covenants.

If the Human Rights Commission would have filed its complaint and then followed Section 49-2-504 of Title 49, the citizens of the valley would have cooperated and wiped out the problem. That section states the Commission staff shall informally investigate the matter set in a filed complaint promptly and impartially. If the staff determines that the allegations are supported by substantial evidence, it shall immediately try to eliminate the discriminatory practice by conference, conciliation, and persuasion.

The good citizens of the Flathead Valley would have cooperated. They only needed to be made aware of a problem. When due process is thwarted, the rights of all citizens are threatened. We all lose.

{Tape: 3; Side: A; Approx. Time Count: 5:58 p.m.}

John Shontz, Attorney, Montana Association of Realtors, said he has been given the charge of walking through this bill.

This is a place in the law where we have deposited the power to file a complaint, to investigate the complaint, to prosecute the complaint, to sit in judgement of the complaint, to levy a fine as a consequence of the judgement and to keep the money all by one entity. No where in our law do we allow that to happen except here.

It is a common course of action in civil law countries such as Spain, but not here. Even in a criminal action, we separate the complainant from the police who investigate it, from the County Attorney who makes an independent judgement rather not to prosecute it, to the judge or jury who sits in independent judgement of the matter.

Mr. Shontz submits what they trying to do is present a concept that brings the Human Rights process into compliance with our basic common law values. He also suggests this legislation in no way affects the discrimination laws that we have assembled in this state to protect people's rights. They are good and needed laws.

On page 1, under the purpose in the bill it makes a substitutive change as it does in Section 2. It states the staffing process of the Human Rights Commission would be placed under the Department of Labor as a division. The Commission would remain an independent, administrative law body that would sit in judgement of cases and controversy as is appropriate.

Structurally, it would work in some respects, for example, for the Department of Environmental Quality and the Board of Environmental Review. The Board is administratively attached to the Department and the work is done staff-wise at the Department level. This is not a new concept.

Mr. Shontz referred to Exhibit 2 in **EXHIBIT 8** which is a bill from the 1979 legislative session which would have accomplished precisely those things. Now this is another request twenty years later.

Section 3 of the bill is regarding subpoena power. There is a provision in our law where the Commission can grant subpoena power to a staff member.

Mr. Shontz suggested to the committee that language be stricken and the procedure ought to be that if there is cause to issue a subpoena, that the staff member can approach the Commission or a member of the Commission, lay the case before them, and the Commissioners can then issue the subpoena. This is a small check and balance in the process of administering a law that we expect to happen in any other venue.

Section 4 talks about adopting rules and this amendment provides, under procedural manners in cases of controversy, that the Commission and staff use rules of civil procedure and the rules of evidence in handling cases. This may be troublesome at the informal staff level, but **Mr. Shontz** would like to present this as methodology for making sure that people's due process rights are protected.

The expectation throughout this process ought to be that if someone's rights are affected, in any way, they ought to have the protection of the law they would be granted were they involved in a complainant district court.

Page 4, line 6 of the bill is an amendment at the request of Lee Enterprises, four of Montana's daily newspapers.

Page 7 is the Section which deals with the filing of complaints. Under current law, the Commission has the ability to file its own complaints. In the housing arena at the federal level **Mr. Shontz** has not found this as a grant requirement. He strongly urges the adoption of this amendment. The judge and the prosecutor should not have the power to bring us before them.

Section 7, bottom of page 7 talks about court injunctions. As a quasi-judicial board the Human Rights Commission has the authority to issue injunctions against parties to cease and desist. They should not have the ability to act as an advocate in this sense for anyone. They should remain an independent, impartial body of folks investigating and standing in judgement of complaints. If a complainant needs to get an injunction, they should do so. The Commission itself can issue it or if an injunction is necessary, the complainant can seek one in district court.

Page 8 of the bill, line 2, section 49-2-504 is a troublesome section in that many people feel that line 4 actually would read that the Commission staff shall immediately attempt to eliminate the discriminatory practice by conference conciliation and persuasion. Unfortunately, many people will say in reality if you substitute those three words for intimidation, that is a better word to put there in terms of practice. That is a management issue and not something the legislature can address. The amendment on page 8, line 4 addresses the level of evidence required before we go to informal review. On line 4 the law states if the staff determines that the allegations are supported by substantial evidence, then we move forward with this informal

process. This means there is possibly 25% evidence that a person may or may not have committed alleged discrimination. In civil matters in District Court in Montana and around the country, that standard is a preponderance of the evidence. There has to be more evidence than not, that discrimination has occurred. If there is not more evidence than not, then the complaint ought not to move forward here. It can go to District Court.

The amendment on line 5, which states the staff shall, upon the first working receipt of filed complaint, notify the respondent that the respondent is the subject of a filed complaint. **Mr. Shontz** said in the Department of Commerce there is a professional occupational division which does that. That doesn't begin or initiate an investigation until the respondent is notified and has a chance to respond in writing that, in fact, a complaint has been filed. That is bare bone, simple rule of law. If a complaint comes in on Friday, it ought to be sent out on Monday.

In a contested case hearing, Section 9, the Commission staff should not be presenting cases and operating as an advocate for anyone in this process. That is the complainant's job and the respondent's job, nor should the expectation be any less in terms of due process. This is a very serious matter at that level. Section 4 under our law the prevailing party can win attorneys fees.

Page 9, Section 11 states if the Commission's order is not obeyed, if the District Court order is not obeyed, or if a Justice Court order is not obeyed, the person who has won the judgement has the right to go to District Court and have that order obeyed. The Commission should not be in the business of doing that. In Montana, District Courts don't appeal to the Supreme Court to have their orders obeyed. Justices of the Peace do not run upstairs to the District Court and ask the District Judge to have their orders obeyed. That is the job of the parties to the transaction.

He asked the committee to turn to line 12, page 9. One of the issues here is that once a case is resolved, the statute allows the Commission staff period up to three years to monitor the situation to make sure the law is being followed. **Mr. Shontz** suggests that one year is adequate.

Referring to Section 12, line 26 he stated under the law that we have today, the Commission or its staff can hold a case at that level for a year, essentially without resolution, even if the parties choose to take the case to District Court. If a party or parties chooses to take a case to District Court it ought to go there.

The Commission and its staff should not have the ability to prevent cases from going to District Court. That is the one-year letter issue. A complaint is filed, people get busy and it sits for a year. While it is sitting, memories fade, people move,

documents are lost and at the end of the year often nothing happens except a letter is issued that states they can go to court. If a party wants to move an action to District Court, they should be able to do that. The same rule applies in Justice Court. If, in fact, a case is moved to District Court, then the Commission and its staff should consider from their point of view that the case is over.

On page 10, line 16, a party may ask the District Court to review a decision of the Commission made under this part. This review is not an appeal, but essentially you start over with using the proper rules of evidence, and using the proper rules of civil procedure. Under the law today, cases brought before the Commission and managed under the rules of administrative procedure are not held to the same procedural standards as an action in District Court. It would not be appropriate for the District Court to simply review a record that is founded in evidence and procedure that no other case before the District Court can be brought under.

If this legislature chooses to make the Human Rights Commission operate under the rules of evidence and the rules of civil procedure, then it probably wouldn't be necessary for cases at the District Court to be reviewed *de novo*. They can be reviewed as appeal. The rules of the game would apply at the administrative level as they do at the District Court level.

In explaining page 11, Section 13 of the bill, **Mr. Shontz** stated there are two things involved, the injured party files the complaint, the Commission does not file the complaint, nor does its staff. Line 8 says the complaint must be filed within one year. The amendment indicates 90 days. The grant rules under HUD require 180 days and he encourages the change from 90 to 180 since that is the law.

The next section deals with the structure of punitive damages and he suggests as required by federal law, that individuals who have a repeated pattern of discrimination, should receive additional fines over and above compensatory damages and in this case, $10,000 if they have done it once before, $25,000 if they've done it multiple times. Those penalties should be accessed under rules of punitive damages in the state.

Mr. Shontz said one other section in the bill makes sure folks that go to court, that can't afford an attorney can get one and that all civil and administrative penalties not go to anyone other than the State General Fund. Finally, page 14, Section 14, one of the things that occasionally happens is that real estate folks are required to disclose adverse material facts, things they know about the property that may not be kosher. If they obey one law, they inadvertently violate another law. When that happens, an individual should not be required to choose between the more onerous penalty of violating one law versus the other. The section states if a person essentially does what he is

suppose to do in his profession, then he will be held harmless for that act under this statute. That is all this bill does.

Carole Phillips, Representing Self, Kalispell, supported SB 350. **(EXHIBIT 14)**

Punky Darkenwald, Representing Self, Billings, said she is the infamous 'ad lady'. She said there is a copy of her ad in the notebook **(EXHIBIT 8).** She read the ad to the committee and said she placed the ad August 3, 1991 and had two phone calls on the condo. She agreed to meet them and one lady showed up.

Ms. Darkenwald said she explained to her she had previously agreed to show it to a friend and that she would know Saturday morning whether or not she wanted it. She told her she would call to let her know, but this lady did not have a phone. The next morning a couple from Columbus, Montana phoned **Ms. Darkenwald**, got the key from her, looked at the condo and were back within fifteen minutes. They gave her a check.

She thought the condo bi-laws protected her in regards to renting it to a family with children. The bi-laws stated she could not rent to anyone under age 18. The units are managed by very knowledgeable people, the Corning Company. In all the time they owned the condominium, she had never seen youngsters in there.

Ms. Darkenwald said next she got a phone call from the compliance officer for the Concerned Citizen's Coalition. She asked **Ms. Darkenwald** if she would not agree that there was an unwritten agreement with the owners in the condominiums to never rent to a minority. **Ms. Darkenwald** said that is a lie. The compliance officer then asked if she realized she would receive a substantial fine and possibly a prison sentence when HUD got finished with it.

During her hearing, **Ms. Darkenwald** said she asked an American Indian woman what she had done or said to upset her. She answered, "Nothing, it is just a feeling I have had".

Ms. Darkenwald said she has paid $1,000 in legal fees and she is retired. She is terrorized and angry. She talked to an attorney who told her if she had six figures she could fight it. She received no copies of anything in the hearing and was told she could have an attorney present but he could not speak to her nor could she speak to him.

She asked the hearing officer what a person who is 60 to 65 is suppose to do if they want to live somewhere quiet and your kids are grown and gone and you are sick of yard work. She responded that **Ms. Darkenwald** should buy 120 acres and build a house right in the middle of it.

Ms. Darkenwald said if these people had called her or the company that manages the condo units and told them they were out of

compliance, it would have been fixed within a week. But instead this past year and one-half she has gone through pure 'hell', and so have the Cornings. They were told they were going to have to build a very large playground in the middle of the condominium units.

{Tape: 3; Side: B; Approx. Time Count: 6:35 p.m.}

Ms. Darkenwald said she has been pretty fair to everyone but who is the Human Rights Commission responsible to? She thanked the committee for hearing the stories from people in this state. She said somebody has got to get a handle on this situation.

Candace Torgenson, Montana Retail Association, submitted her testimony for the record but did not speak. **(EXHIBIT 15)**

Dean Randash, NAPA Auto Parts, spoke in support of SB 350. **(EXHIBIT 16)**

Bob Gilbert, Montana Petroleum Marketer's Association, spoke about one of their members who owned two bulk plants. In that plant he employed a manager who drove the truck, delivered the fuel, maintained the equipment including the plant facilities, cleaned up, handled the barrels of oil, stocked the products and also employed a secretary. The secretary's duties were to answer the phone, take orders and do light bookkeeping.

After a period of time the manager quit, the employer then advertised for a new manager and the ad read "Manager for small bulk plant, for small bulk fuel distribution center, all duties and responsibilities included". As the applicants called, he explained to them what those duties where, which are described above.

A couple a weeks later, the secretary called wanting the manager's job. The employer asked if the secretary understood the job duties. The secretary responded all this was understood but did not want to do all that, just be the manager. The employer said he could not hire the secretary unless the descriptions in the job requirement were followed.

A couple of weeks after that the secretary quit and then filed a sexual discrimination suit against the employer because she didn't get the job.

That happened two years ago and the case has not yet been decided. We do not have due process, we have no process. That is why this bill is here.

Debbie Leadbetter, Ennis, Montana, read her husband's testimony. **(EXHIBIT 17)**

Diana Rice, Harrison, Montana, supported SB 350 on behalf of her father-in-law. **(EXHIBIT 18)**

Charles Brooks, Billings Chamber of Commerce, said they support SB 350. **Mr. Brooks** personally stands in support because he was a subject of an investigation over fifteen years ago when he had a small retail chain of stores and was the Chief Operating Officer and Vice President of. They had over 200 employees. They had an employee who was not punctual and continually reminded she should show up on time.

The charge was filed against **Mr. Brooks** instead of the store manager and after over a year of real personal investigations of him, his lifestyle, and his company, the case was dismissed.

His company spent thousands of dollars trying to defend themselves on a case that could have been resolved in less than 30 days, had it been properly handled by the Human Rights Commission. The problems with the Human Rights Commission has been going on for an exceedingly long time.

Ronda Carpenter, Executive Director, Montana Housing Providers, which is a coalition of eleven landlord associations around the state with approximately 900 members who provide housing to about 11,000 units of housing to Montana citizens. They would like to be on record as supporting SB 350.

Karen Haar, Northwest Association of Realtors, said she expected about 20 or 25 other realtors to come down with them, they began dropping out and all for the same reason. They were afraid they would be targeted and blacklisted, that the Human Rights Commission would go after them.

Ms. Haar said she has never been accused of discriminatory practices and has always believed in fair housing. As members of the real estate profession, they have to be constantly on guard to protect everyone and not to discriminate.

In addition, they always have to be very careful not to show preference towards any special group on the basis of race, creed, religion, sex, etc. She submitted a poster brought to Kalispell two years ago. **(EXHIBIT 19)** They cannot use discriminatory posters or advertising at all.

Two years ago in the winter of 1995, the staff of the Human Rights Commission came to Kalispell and at a public meeting brought posters, which have been recalled.

Ms. Haar said she still sees them and at the Flathead Building Association she saw one last week. She asked the committee to inspect what they used as a logo. It is a dream catcher with a tepee in the center.

Ms. Haar does not believe this shows standards of impartiality and objectivity.

Jack Martinz, Superior Fire Apparatus, supported SB 350. **(EXHIBIT 20 & 21)**

Karen Roach, Board of Directors, Northwest Montana Association of Realtors, distributed **(EXHIBIT 22).** She believes that fair housing regulations are necessary and does protect the public. The Human Rights Commission recently claimed that they do no testing. The brochure **(EXHIBIT 22)** states the Commission conducts testing.

Also, the administrator quotes in the press, "An investigator may pose as an interested buyer on the phone". This is testing. One of the 23 tested in the Flathead case has shared with others that not only did the tester pose as a buyer, but set an appointment for the next afternoon to view a home. The agent set up the appointment with the sellers in a mobile home. They cleaned and prepared for a showing. The agent showed up and waited and waited, only to have to apologize to the sellers for their wasted time and efforts. Fair treatment, she wonders?

Opponents' Testimony:

Pat Echart, Chair, Human Rights Commission, Glasgow, gave a list of other members of the Commission. She said they work very hard to understand and deal fairly with the issues before them. The five of them come from around the state and as business owners, employers, and employees, are very concerned the Commission's decisions are neutral and objective.

The staff is very competent, hard-working and dedicated and find themselves always behind in their work because of increased numbers of cases filed and a shortage of staff to deal with them. This has resulted in a large backlog of cases.

In spite of that, **Ms. Echart** said the process for the most part works well for complainants and respondents alike. In the last bi-annum, they screened nearly 7,000 complaints which resulted in over 1200 cases being filed and closed approximately the same number during that period. This was a 14% increase from the two years preceding that. Of the cases they closed, 37% favored the complainants, and 29% favored the respondents.

Human Rights in the State of Montana must be protected and the Commission has been helping to do this for 23 years. As such, they believe they should be part of any process that will make a change in this assignment.

She acknowledged the serious criticism of the actions of the Commission. She stated the committee must also understand that the criticism represents a very small part of what they do. They realize they made some procedure mistakes in the Flathead, but they are very serious about preventing mistakes like these in the future and have adopted new protocols to hopefully avoid a repeat of these errors. They are open to suggestions for improvements.

They are convinced this bill won't accomplish the wishes of the concerned parties. What will happen is that the processed outlined in the bill will be very costly and cumbersome, it will subject employers and housing providers to separate state and federal investigations and litigation.

Ms. Eckhart distributed a letter from HUD. **(EXHIBIT 23)** She said this letter expresses their view that this bill will preclude them from engaging in the present work-share arrangement with them which would cause a loss of a significant amount of the Human Rights Commission funding which would mean they wouldn't have to investigate the cases under state law and then HUD would dually investigate the cases under federal law.

Another factor, if this bill is approved is that many of the cases that are resolved now in the Commission's informal proceeding would be removed from their jurisdiction into the already overcrowded court system. They have asked the staff to draft a substitute bill which will create some of the administrative separation that the public is concerned about. To accomplish this, they propose their staff will not present any cases in administrative sharing before the Commission. Pattern and practice cases like the Flathead matter would be referred to the Attorney General's office. This substitute legislation would also clear up any other confusing areas of the law. They are most willing to work out differences and contribute to the success of this legislation.

The administrator, **Anne McIntyre,** would be willing to go over their specific recommendations before executive action is taken on this measure. She thanked the committee for hearing her speak.

Sue Fifield, Executive Director, Montana Fair Housing, said they work on housing discrimination issues across Montana. They believe that the majority of housing providers in Montana believe in and support the ending of housing discrimination. They believe the supporters of this bill might not be aware of the full impact this bill will have on housing discrimination cases in Montana for parties on both sides. They oppose SB 350.

This bill takes away Montana's substantial equivalency to the Federal Fair Housing Act. By passage of this bill, the state will be taking away state control of housing discrimination complaints. They would then be in a position of filing in both the state and federal arenas. By doing this, costs are raised for both the housing provider and the consumer in any housing discrimination complaint filed.

Currently, when they receive a complaint and if the subsequent investigation of the allegations suggest that discriminatory acts did occur, they file the complaints with the Montana Human Rights Commission and HUD. Because the Montana Human Rights Commission is substantially equivalent and HUD contracts with them, they are

the ones that do a single investigation. If the bill is implemented, it will require a dual investigation, one by HUD and one by the Commission.

They will be placed in a position of obtaining legal counsel from the beginning of their complaint process. Many times the Commission will be able to set up a face-to-face meeting with all parties involved to allow the presentation of facts from both sides. In their experience, this process has been very successful and alleviates the legal costs for both sides. If this bill passes, this process will most likely not be implemented at all. Many times if both sides can sit down and understand each others concerns, the complaint can be dealt with in a more expeditious and positive manner.

Furthermore, utilizing the federal process, the cases usually secure much higher settlement amounts. Federal cases base settlement awards on a national average rather than a state average. She quoted examples. She said they also offer work shops to ensure that people understand the law.

Ms. Fifield stated that passing this bill is not going to accomplish what supporters of this bill want to accomplish. They believe the bill will be detrimental to both sides of the complaint process by increasing costs with legal counsel and taking the control out-of-state to the federal process.

Ms. Fifield said the poster **(EXHIBIT 19)** was not a poster from the Human Rights Commission but was from another fair housing organization through a HUD grant, and the origin of that grant was based on national origin, particularly Indian. She urged the Committee to oppose this bill in its present form.

{Tape: 4; Side: A; Approx. Time Count: 7:15 p.m.}

Catherine Swift, Representing Self, read her written testimony. **(EXHIBIT 25)**

Don Waldron, Montana Rural Education Association (MREA), was unable to attend but sent his written testimony with **Catherine Swift. (EXHIBIT 26)**

Alane Harkin, Private Citizen, urged the opposition of SB 350, explaining in 1993 she had been served with a complaint from the Human Rights Commission alleging she, as a landlord, had discriminated against a potential tenant.

She said she found the Human Rights Commission staff to be very helpful and non-partisan in their dealings with her; in fact, they gave her information regarding procedure, though they did not coach her in which steps to take when.

Ms. Harkin stated both she and the complainant wrote their testimony and then went into a mediation meeting, which was set

up at both parties' convenience. She said she was impressed with the mediation skills of the facilitator as they moved through the process, explaining the complaint was filed in August, 1993, and resolved in December, 1993.

Ms. Harkin reported she did not have to seek legal counsel and the only cost was the short amount of time she had to take off work, which was done at her convenience.

Ms. Harkin suggested SB 370 would not allow individuals the opportunity to go to the Human Rights Commission to represent themselves, but would make them adversaries in a litigious process and would force them to hire attorneys. She urged the committee to give the Commission time to make changes which would help all citizens in a better fashion.

She gave a personal example of how she suffered sexual harrassment as an employee for years but was afraid to come forward, so someone else filed a claim for her. She felt there should be a method to help people have access to groups, like the Human Rights Commission, which would protect rights; however, the Commission was neither all bad, nor all good. **Ms. Harkin** asked for a chance to see what the other bill would look like.

Janice Doggett, Attorney, said she had worked with staff from the Human Rights Commission and reiterated what **Catherine Swift** said regarding the process being open, accessible, and fair to both parties.

She spoke to some of the procedural aspects of SB 350 which are stated in the following:

(1) Provision for *de novo* review after the Commission hearing. There would be an informal investigation, formal hearing before the hearing officer, appeal to the Commission and appeal to the State District Court; however, on top of that SB 350 would allow another *de novo* review. It would not be cost efficient for either employees or employers; nor would it be necessary because there was currently a process for judicial review.

(2) From the inception, rules of civil procedure and rules of evidence would have to be used, which would be acceptable during the formal hearing process but during the informal process it could be cumbersome and time-consuming.

(3) Dealing with EEOC. She said she would much rather work with the Human Rights Commission than the EEOC. SB 350 would allow either the claimant or respondent to go right to District Court without the time for an informal process to take place; however, if the employer went, the EEOC would still investigate, but if the claimant went, they could decide whether they would like to join their EEOC complaint in district court; therefore, the respondent had no control over when EEOC would investigate, which

could mean there would be a claim in district court as well as an EEOC claim.

Ms. Doggett cautioned the committee to look at the provisions of SB 350.

Mike Meloy, Attorney, said he had spent 20 years litigating cases before the Human Rights Commission, representing both plaintiffs and defendants. He said over the past four years almost 2,900 cases had been filed with the Human Rights Commission and only 14 of those had been initiated by complaint of the Commission.

Mr. Meloy suggested the way SB 350 was drafted would have devastating impact on 99.5% of the total cases because procedures within the bill were being changed which would affect them, as stated in the following:

(1) When it was said the Commission had no more enforcement authority, the partnership between the federal and state governments would be lost. This partnership brings over $300,000 per year to Montana for the Human Rights Commission and also permits the state of Montana to handle its own cases.

(2) Much longer period of delay between the time of filing and investigation of the charge (informal process), which could mean attorneys getting involved in the investigation, something they did not currently do. This would turn this informal process into attorneys' dreams because they would have to be involved from the start and could not quit until it was settled.

Mr. Meloy maintained the drafter of SB 350 didn't do much in court because:

(1) As far as he knew, cause was not necessary for the issuance of a subpoena.

(2) Every case he had ever done before the Human Rights Commission hearings officer required following the rules of evidence.

(3) It imposed a requirement on a currently informal process that the rules of civil procedure apply, which meant the discovery done during the investigatory stage would be done pursuant to the rules of civil procedure. Those rules could not be done without a lawyer, i.e. lawyers would be doing things they never do now and the cost would rise substantially.

(4) Page 10 -- the sentence added to the section dealing with the Commission dismissing a complaint was broader; therefore, if a de novo hearing was desired, it shouldn't be in that section. Also, from the employer's perspective, a de novo hearing was not a good idea because it could be perceived as having a second chance if the employer lost before a hearing examiner; in addition, the costs would double.

(5) Section which seemed to dump damages into the General Fund, and as it was now written seemed to amend a provision of the Housing Discrimination Code where penalties recovered were credited to the General Fund. He maintained the language "part" pertained to the entire operative sections of the Human Rights Act. If it was the intent of the sponsors to include individual damages sought in connection with a Human Rights claim to go to the General Fund, there would be never be a charging party who would allow the damages to go to the General Fund.

Mr. Meloy suggested if a person thought something was wrong with the provisions of the Human Rights Act which authorized the Commission to bring complaints by themselves, another bill besides SB 350 would be necessary because SB 350 was not in their best interests.

Christine Kaufmann, Montana Human Rights Network, read her written testimony. **(EXHIBIT 27)**

Frederick F. Sherwood, Attorney, was unable to attend so sent his written testimony with **Christine Kaufmann. (EXHIBIT 28)**

Kate Choleva, Montana Women's Lobby, said the Human Rights Commission dealt with discrimination issues which extended beyond what happened at the Flathead, and many of those incidents involved women and children. She said they did not want the ability of the Human Rights Commission to address discrimination gutted, which is what they believed SB 350 did.

Ms. Choleva agreed with **Christine Kaufmann** it would be more honest to eliminate the Human Rights Commission than to strip its enforcing powers. She said they disagreed the Human Rights Commission advocated for clients; rather, they advocated for nondiscriminatory practices.

As for the Flathead issue, she said it seemed a law was broken accidentally and the Commission enforced it; however, retaliation was part of the issue but revenge for this incident would hurt hundreds of Montanans suffering discrimination.

Ms. Choleva suggested Montanans would be fooled into thinking the legislature supported human rights laws if the way to enforce them was deleted. She expressed opposition for SB 350.

Sharon Hoff, Montana Catholic Conference, said the Catholic Church had broad statements concerning discrimination; however, she did not have all the facts concerning the Flathead case. She stated she felt SB 350 weakened the Human Rights Commission and took away a great deal of their way of dealing with complaints.

Ms. Hoff said one of the pieces for the Catholic Church was to ensure people were not discriminated against for any reason, and they would support any person whose rights had been challenged. She wondered if the budget cut would be transferred to the

Department of Labor and if the monies would be restored so the Department could hire the number of people they needed. She referred to Page 13 and said "general public importance" seemed to be the equivalent of the common good, which was always considered by the church because it wanted to see businesses thrive, yet give individuals the process to file legitimate complaints.

Ms. Hoff said one piece within the Welfare Reform Law was the work requirement and wondered if federal sanctions would come if there were a lot of complaints based on race or sex. She urged the committee not to support SB 350.

{Tape: 4; Side: B; Approx. Time Count: 7:53 p.m.}

Jim Meldrum, Private Citizen, agreed with the opposition given to SB 350, explaining he worked with people with disabilities and many of them would be unable to employ an attorney. He asked the committee not to approve SB 350 as it was currently written.

Al Smith, Montana Advocacy Program, said they advocated for the rights of persons with disabilities. He informed the Committee the Human Rights Commission worked because the process and procedure was reasonable.

Mr. Smith also said they found the investigative process often helped people resolve matters before the litigation step. He explained informal procedures as something which helped people work out the problems, and shared an example of a hearing-impaired person who was denied an interview for a bookkeeping job.

He said if the law had been as in SB 350, she would have gotten an attorney within 30 days which would have cost a great deal of money; however, the informal process allowed the ensuring of employer education and policy changes, which cost virtually nothing.

He suggested SB 350 would add another layer of bureaucracy because federal investigations would also be involved, and added there was a backlog in the state HRC; however, the complaints were thoroughly investigated and mostly settled without litigation.

Mr. Smith said he referred folks to HRC rather than ligitation because it was not always necessary to go to court and people with disabilities were often unable to process the complaint themselves, but could be helped by HRC. He said if there were problems, they should be addressed; the whole agency should not be killed.

Mary Westwood, Private Citizen, said she had always been proud to have been raised as a Montanan who was taught to treat people as individuals and accept them on their own merits; however, she had

since learned that was not always true because she could see discrimination in various places.
She had been asked to serve on the board for a fair housing group in Billings and as she learned more about this issue, she realized there was a great deal of discrimination in her community, especially against Native Americans.

Ms. Westwood suggested it was hard for people to admit they discriminated because of attitudes they were raised with, heard or because it was easier to go along than do something about it. She shared a story about a Native American mother with two children who lived in a fairly nice part of town. The dwelling was a duplex, with the owner living in the other side. While living there, the mother and children did not speak above a whisper, did not play the TV after 8 p.m. and did not have friends in. When her father visited and dropped a cigarette butt outside the door, she was threatened with eviction because she had damaged the property.

During vacation their large screen TV disappeared; however, their apartment was locked when they returned home. The mother was an excellent housekeeper, well employed by the federal government; yet, she and her family had to live this way because in Billings there would have been no affordable housing for them. They helped this family contact the Human Rights Commission.

Ms. Westwood also shared a personal experience about employment as a copy editor for a newspaper but receiving less pay than the men because she was not married nor did she have a family; however, she was told it was all right. She said if SB 350 passed, it would be more difficult for people to come forward with their human rights complaints. She reminded the committee HRC was a conscientious agency and needed their independence and needed to be supported. She urged the committee to look at the specific problems of the agency but not damage it.

Questions From Committee Members and Responses:

SEN. STEVE BENEDICT asked how many cases the Human Rights Commission investigated within a year. **Pat Echart** said they investigated about 600 cases per year.

SEN. BENEDICT referred to the statement some people were happy, some were unhappy and a handful of cases were mishandled and wondered if the irreparable damages of the mishandled handful was acceptable to the Commission. **Ms. Echart** said it was not acceptable.

SEN. BENEDICT asked if it was fair to characterize people who had been harmed by the Human Rights Commission as gophers. **Mary Westwood** said no, but SB 350 stripped the agency of its independence.

SEN. DEBBIE SHEA asked where the legislation was that **Ms. Echart** was working on and wondered about the comments "it lacks balance", "equal access to justice", "employers taking second fiddle to employees", "no due process", "abuse of power", "witch hunt", "judge, jury, executioner and administrator".

Ms. Echart said it was the intention of HRC as soon as a case was filed, the process of conciliation and mediation would begin through an investigator who contacted both parties to resolve the matter before it went any further. She said even if the matter went into the investigatory stage and further, all along the way there was opportunity to settle the case and for both parties to talk to each other.

SEN. SHEA asked if the settling meant the $5,000 standard heard throughout the hearing.

Ms. Echart said the settling was an agreement between both parties, and as for the legislation, someone was not carrying the bill but an amendment had been submitted for the Committee's consideration.

SEN. JIM BURNETT asked what it cost the plaintiff to request the Commission to investigate.

Mike Meloy said it didn't cost the person bringing the complaint anything, as long as they were not represented by counsel.

SEN. BURNETT asked if it cost the defendant anything.

Mr. Meloy said the preliminary stages of the proceeding included:

(1) The complainant filling out the complaint and going to the Commission office to sign it.

(2) The complaint being sent to the respondent who responded back, but not because of a preparation by an attorney.

(3) If the reasonable cause finding was issued and certified for hearing, or moved into district court, lawyers were involved at that point.

Mr. Meloy said until #3, the only cost was the time of both parties.

SEN. FRED THOMAS asked how many days a month the Commission met.

Pat Echart said every other month for about two days.

SEN. THOMAS asked what was done at these meetings.

Ms. Echart said they dealt with cases at different levels, and if cases were dismissed, complainants or respondents could object to the dismissal. At that point HRC would have to act, and if the

Commission found there was no reason for the parties to stay in the hearing process, it would have to end; however, if the decision was reversed, it would go back into the process and into a hearing, and if it went into an appeal, it would come to the Commission for a final order.

SEN. THOMAS asked about how many cases were passed at each of those meetings.

Ms. Echart said an average of six cases.

SEN. THOMAS asked if all aspects of the meetings were open to the public and was told they were.

SEN. THOMAS asked if the Commission was directly involved in running the Human Rights organization on a day-to-day basis.

Pat Echart said on a day-to-day basis the Commission was operated by an administrator but the job of supervising the Commission was complicated. The method used in the Flathead cases was beyond the Commission's ability to understand at the time; however, they learned from the mistakes and felt they could recommend procedure, protocol and processes which would alleviate something like that from happening again. She said they were capable of managing the five staff, and keeping abreast of the current needs and issues was doable.

SEN. SUE BARTLETT asked for clarification of **Jamie Neer's** testimony.

Jamie Neer said the only reason he opened the thing up was to see if the average person could make a change in the system; however, it had become blown out of shape. He explained to have the Human Rights come representing another lawyer who was close friends with the person who ran Human Rights, for something he felt strongly in, his friend Jack gave the committee a newspaper article on him. This whole case started out, and he got called out on the carpet on it, when he was told not to bring up sexual orientation in any way, shape or form, and he didn't think he did; however, the case started out as a male against a male. His employee came to him and said he was bringing something to his attention, saying if he didn't do something about it, the employee would sue him for his house, car and whole shop.

Mr. Neer said the employee had never done anything to earn anything in his whole life; yet, the Human Rights was defending the employee as if he was poor and downtrodden. He maintained Mr. Kelly waived in his favor, saying the employee had gone beyond his bounds in threatening him with legal action.

He reminded the committee the incident started out with sexual misconduct between two male employees, one of who was gone; however, the employee who brought it to his attention had been

written up on several occasions with the education from the state who helped him design a procedural handbook.

Mr. Neer said when he presented the handbook to the Human Rights they wanted to know if it was notarized. He stated the venue changed from sexual orientation to whether the individual's rights were protected by the Human Rights and that was why the case was going to district court. He maintained he had done nothing wrong but try to protect himself, his family and his business.

SEN. BARTLETT stressed she was trying to clarify in her mind whether the earlier incident involved the same people as the one a month earlier.

Mr. Neer said they weren't the same; he was trying to tell the committee employees knew their rights but employers didn't know theirs.

SEN. SUE BARTLETT asked if it was the intent to change the process the Human Rights Commission used to the point they would no longer be recognized to be eligible to conduct a joint investigation by federal agencies, i.e. two processes would be necessary.

David Owen said it wasn't, but there were disagreements regarding the citations and those would have to be sorted out. He said he was trying to listen carefully on the employment side so something worse was not created; it was frustrating to both him and his board to feel they had such limited ability to affect that contract.

SEN. BARTLETT asked if the contract was between the EEOC and the Human Rights Commission. **Mr. Owen** said it was.

SEN. BARTLETT asked **Mr. Owen** if he was willing to talk to the Human Rights Commission about the proposed amendments.

David Owen said they were and the Chamber's goal all along had been to try to find some answers and something that works better.

SEN. FRED THOMAS asked if the Commission was involved in the discussed ongoing activity.

Pat Echart said it was before the initial letter went out, the staff briefed them on what had been found and the requirements of the law were discussed; however, they weren't "on the same page" when it came to how that would be transmitted to the people concerned.

She explained their staff thought there were a lot of parties involved and certain factors that influenced the situation. Every time they would meet to deal with one aspect, it seemed things were moving toward conciliation and agreement; in fact,

there were proposals from the realtors which were studied and accepted and workshops in Helena and Kalispell which many realtors and her staff attended.

Most of the time, along the way, they felt even though they got off to a bad start, they were working toward the goal of resolving the issue through terms which would improve the relations among them, the Homeowners' Association and community to make the properties available for families.

SEN. STEVE BENEDICT asked if there was a financial incentive for anyone in the Human Rights Commission or Department itself to settle cases.

Ann McIntyre said there was none.

SEN. BENEDICT referred to a letter signed by **Ms. McIntyre** which indicated the Commission invited a party to participate in a voluntary resolution as a preferable alternative to litigation. At a minimum, the party was required to put an end to the practice of listing and selling properties with restrictive convenants which had the effect of unlawfully restricting occupancy on the basis of familial status, compensate any identified injured parties, establish an affirmative marketing program and impose a meaningful civil penalty. He wondered what was voluntary about the letter.

Ms. McIntyre said it was voluntary as an alternative to litigation. The Commission was charged with enforcing the laws involved in the situation and felt a fairly clear and overt violation occurred. It was appropriate to seek the enforcement of the law in a legal proceeding, if necessary; however, it was also appropriate to try to resolve the case prior to filing the complaint.

SEN. BENEDICT said previous testimony indicated mistakes were made in Kalispell; yet, this letter didn't have the tone of a Commission that made mistakes.

Ann McIntyre said the letter he read was considered a mistake because of its tone.

CHAIRMAN TOM KEATING asked **Ms. McIntyre** how many lawyers were on her staff and was told there were three, one was counsel to the Commission, one served as the hearing examiner and one who worked on special projects funded by HUD; however, that position expired at the end of June. Also, several of the investigators were attorneys, but currently they were not working in that capacity.

CHAIRMAN KEATING asked the meaning of "investigator" and **Ms. McIntyre** said when complaints were filed with the Commission, it was charged with conducting the investigation.

CHAIRMAN KEATING asked if they were referred to as "staff."

Ann McIntyre said some were investigators, some were attorneys and some were support staff.

CHAIRMAN KEATING asked if non-lawyers were involved in the informal hearing.

Ms. McIntyre said non-lawyers were also investigators.

CHAIRMAN KEATING asked if both the lawyers and non-lawyers conducted the informal hearings, depending on who was assigned the case.

Ann McIntyre said the case was assigned for investigation, which was the informal process and not typically a hearing, though at times the investigator might convene a fact-finding conference which would bring the parties together.

CHAIRMAN KEATING asked if the claimant and respondent were brought together, face-to-face, and if the investigator heard both sides of the issue.

Ms. McIntyre answered in the affirmative to both questions.

CHAIRMAN KEATING then asked what the investigator did with the material and was told the investigator would take the information given by both parties but could decide it was necessary to gather additional information from witnesses and/or those who had knowledge of the complaint; however, once the investigation was completed, the investigator would write a report and make an investigative finding.

CHAIRMAN KEATING asked if at that point the respondent was notified by mail to inform there was reasonable cause and they would be charged.

Ms. McIntyre said the respondent was notified by mail of the finding and the Commission attempted to resolve the case through a conciliation process to try resolution.

CHAIRMAN KEATING asked who in the organization did that and was told an investigator who had not been involved with the case did. Also, if at that point the conciliation was not successful, it was certified for a contested case hearing (formal hearing process).

CHAIRMAN KEATING asked why some cases took four or five years.

Ms. McIntyre said the Commission historically had fewer resources than were needed to adequately do the job; it seemed as the number of staff increased, so did the workload.

CHAIRMAN KEATING asked if either party could go to District Court if the decision was unsatisfactory.

Ann McIntyre said they could.

CHAIRMAN KEATING asked if the Civil Rights Law as applied in these cases definitive and objective or was it subjective to interpretation. **David Owen** said he feared there was room for it to be subjective, explaining even though an attempt had been made to write Human Rights law as black-and-white, there was room for maneuverability, which made it rife for this type of frustration.

{Tape: 5; Side: A; Approx. Time Count: 8:42 p.m.}

Closing by Sponsor:

SEN. WALTER MCNUTT said there was a problem which was demonstrated through phone calls, cards and letters to different legislators. It seemed it revolved around procedure and function and misunderstanding regarding the way the Commission did things, which was contrary to what lay people in the civil and criminal area were used to. He was pleased to hear **Pat Echart** say they offered amendments to SB 350 and apologized for the lateness of the bill.

SEN. MCNUTT said one of the reasons for the lateness was he invited the Commission to bring him the amendments so they could be addressed before the committee got them. He didn't get them and time ran out; however, he was encouraged they were at a point where maybe SB 350 was not the best bill in the world. He affirmed the issue needed to be addressed because it had been festering for far too many years and all people of Montana deserved human rights and not abuses. He said it seemed the program had gotten "out of whack" but they admitted to it; he hoped they could go on and come out of this with a good bill to get some things resolved which would remove some of the mystique.

SEN. MCNUTT felt the public was not educated enough and perhaps if they were, a lot of this would go away.

ADJOURNMENT

Adjournment: The meeting adjourned at 8:45 p.m.

SEN. TOM KEATING, Chairman

GILDA CLANCY, Secretary

TK/GC